TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 205

NATIONAL LEATHER COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

FILED MARCH 28, 1927

(32,569)

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INDEX

	Original	Print
Proceedings in supreme judicial court of Massachusetts	1	1
Judge's certificate to clerk (omitted in printing)	1	
Writ of error and return	3	1
Caption (omitted in printing)	4	
Reservation	5	3
Petition, No. 41617	5	4
Answer	7	6
Order consolidating cases	9	7
Petition, No. 42124	9	8
Answer	11	10
Order consolidating cases	12	12
Agreed statement of facts	13	12
Rescript, No. 41617	17	16
Final decree, No. 41617	18	16
Clerk's certificate (omitted in printing)	19	
Opinion, Rugg, J.	20	17
Petition for writ of error and assignments of error	25	21
Bond on writ of error (omitted in printing)	31	
Citation and service (omitted in printing)	36	
Præcipe for transcript of record	37	25
Waiver of præcipe	39	26
Statement of points to be relied upon and designation to print the entire record	40	26

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[fols. 1 & 2] Judge's certificate to clerk omitted in printing.

[fol. 3]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

WRIT OF ERROR AND RETURN—Filed February 25, 1927

UNITED STATES OF AMERICA, ss:

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between National Leather Company, Plaintiff, and Commonwealth of Massachusetts, Defendant, wherein was drawn in question the validity of a treaty or statute of the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity: a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Su-

preme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

February 25, 1927.

Allowed by Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this seventeenth day of March, A. D. 1927.

John F. Cronin, Clerk.

[File endorsement omitted.]

[fol. 4] [Caption omitted]

[fol. 5] In Supreme Judicial Court of Massachusetts

In Equity

Suffolk County:

No. 41617. Eq.

National Leather Company, a Corporation Organized under the Laws of the State of Maine and Having a Usual Place of Business Within the Commonwealth of Massachusetts, Petitioner,

v.

Commonwealth of Massachusetts, Respondent

No. 42124. Eq.

National Leather Company, a Corporation Organized under the Laws of the State of Maine and Having a Usual Place of Business Within the Commonwealth of Massachusetts, Petitioner,

v.

Commonwealth of Massachusetts, Respondent

Reservation—June 25, 1925

These cases came on to be heard before me and, at the request of the parties, I reserve the same on the pleadings and an agreed statement of facts for the determination of the full court.

Henry K. Braley, Justice, Supreme Judicial Court.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 41617

PETITION FOR ABATEMENT OF TAX—Filed October 3, 1924

To the Honorable the Justices of the Supreme Judicial Court:

Respectfully represents your petitioner

(1) That it is a corporation organized under the laws of the State of Maine and lawfully doing business within the Commonwealth of Massachusetts.

[fol. 6] (2) That it has at all times duly and seasonably filed its tax returns in accordance with law.

(3) That it is provided in Section 39 of Chapter 63 of the General Laws that

"every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following: * * *

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and a half per cent of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth."

(4) That said Chapter 63 of the General Laws and acts in amendment thereof and addition thereto also provide certain minimum standards for the rate of taxation of foreign corporations which are not material to the present proceeding because the tax on your petitioner computed according to such minimum standards would be less than the amount conceded by it to be properly assessable.

(5) That is provided in Paragraph 4 of Section 30 of said Chapter 63 of the General Laws that

"'Corporate excess employed within the commonwealth' by a foreign corporation (shall mean) such proportion of

the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date. * * *"

(6) That your petitioner on April 1, 1923 and continuously since its incorporation was actually engaged in business on its own account, and on said April 1, 1923 it also owned and held certain securities as permanent investments, namely certain shares of stock in two corporations organized under the laws of the State of Maine named respectively National Calfskin Company and A. C. Lawrence Leather Company; and said securities were not employed in any business within the commonwealth on that date.

(7) That nevertheless the Commissioner of Corporations and Taxation, in determining the excise tax upon your petitioner for the year 1923, included said stock of said two corporations among the assets employed in business within [fol. 7] the commonwealth by your petitioner, and by virtue of such inclusion assessed upon your petitioner an excise tax for said year in the sum of $30,719.16, whereas if said stock had not been included as aforesaid the tax which would have been, and in accordance with law should have been, assessed upon your petitioner would have amounted to but $17,299.42, or $13,419.74 less than the tax actually assessed.

(8) That upon the sixth day of April, 1924, your petitioner, upon compulsion and under duress, and after protest in writing, paid the tax thus illegally assessed upon it, with interest amounting to $343.21, making a total of $31,062.37.

(9) That your petitioner is aggrieved by the exaction of part of said excise, namely $13,419.74, for the reason that the inclusion of said stocks of foreign corporations among the assets employed in business in this commonwealth was not authorized by the statute; and that if authorized by statute it would be none the less illegal and void as an attempt to reach by taxation property not within the jurisdiction of the commonwealth, in violation of the

Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioner prays that such portion of said excise as was assessed without authority of law be abated, and that the amount so illegally exacted be repaid to it, with interest and costs.

By its Attorneys, Putnam B. Smith, Philip Nichols.

In Supreme Judicial Court of Massachusetts

Answer—Filed December 4, 1924

The respondent for answer to the petition in the above cause says as follows:

1. The respondent admits the allegations of paragraph 1 of the petition.

2. The respondent denies the allegations of paragraph 2 of the petition. It says that the petitioner filed no return within the first ten days of April, 1923, as of April first, as required by G. L., c. 63.

3. The respondent admits that the petitioner on April 1, 1923, and continuously since its incorporation was engaged in business on its own account and that on said date it also owned and held shares of stock in the National Calfskin Company and the A. C. Lawrence Leather Company, both [fol. 8] organized under the laws of the State of Maine, as alleged in paragraph 6 of the petition. It denies that said securities were not employed in any business within the Commonwealth on said date, and denies all the other allegations in said paragraph. It further alleges that the petitioner and said other two corporations were both actually engaged in business in the Commonwealth on said date, that said securities were held in the Commonwealth, and that said other two corporations were subsidiary companies of the petitioner.

4. The respondent admits that the Commissioner of Corporations and Taxation, in determining the value of the corporate excess employed within the Commonwealth for

the purpose of computing the excise tax upon the petitioner for the year 1923, included said stock of said other two corporations among the assets employed in business within the Commonwealth by the petitioner, as alleged in paragraph 7 of the petition. It denies the remaining allegations of said paragraph.

Further answering the respondent says that during the period in question the petitioner carried on no business outside the Commonwealth, and that the value of the securities in question was accordingly allocated to Massachusetts, but that the Commissioner did not allocate to Massachusetts securities owned by the petitioner of other corporations which were not engaged in business within the Commonwealth.

The respondent further says that the Commissioner originally assessed to the petitioner an excise based on its corporate excess employed within the Commonwealth on April 1, 1923, in the sum of $21,676.49, and subsequently assessed an additional excise based on such corporate excess amounting to $9,042.67, making a total assessment of $30,719.16.

5. In answer to paragraph 8 of the petition the respondent says that on April 8, 1924, the petitioner paid under protest the taxes assessed with interest amounting to $343.21, making a total payment of $31,062.37. The respondent denies each and every other allegation in paragraph 8 of the petition.

6. The respondent denies the allegations of paragraph 9 of the petition, and says that the taxes assessed were in every respect legal and valid.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General.

[fol. 9] In Supreme Judicial Court of Massachusetts

Order Consolidating Cases—June 23, 1925

These cases came on to be heard at this sitting and thereupon, upon consideration thereof, it is ordered, adjudged

and decreed that said cases be, and the same are hereby, consolidated for the purpose of being heard together.

By the Court.

John F. Cronin, Clerk.

[Bradley, J.]

In Supreme Judicial Court of Massachusetts

No. 42124

Petition for Abatement of Tax—Filed Nov. 7, 1924

To the Honorable the Justices of the Supreme Judicial Court:

Respectfully represents your petitioner.

(1) That it is a corporation organized under the laws of the State of Maine and lawfully doing business within the Commonwealth of Massachusetts.

(2) That it has at all times duly and seasonably filed its tax returns in accordance with law.

(3) That it is provided in Section 39 of Chapter 63 of the General Laws that

"every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following: * * *

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and a half per cent of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth."

(4) That said Chapter 63 of the General Laws and acts in amendment thereof and addition thereto also provide certain minimum standards for the rate of taxation of foreign corporations which are not material to the present

proceeding because the tax on your petitioner computed according to such minimum standards would be less than the amount conceded by it to be properly assessable.

[fol. 10] (5) That it is provided in Paragraph 4 of Section 30 of said Chapter 63 of the General Laws that

" 'Corporate excess employed within the commonwealth' by a foreign corporation (shall mean) such proportion of the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date. * * *"

(6) That your petitioner on April 1, 1922 and continuously since its incorporation was actually engaged in business on its own account, and on said April 1, 1922 it also owned and held certain securities as permanent investments, namely certain shares of stock in two corporations organized under the laws of the State of Maine named respectively National Calfskin Company and A. C. Lawrence Leather Company; and said securities were not employed in any business within the commonwealth on that date.

(7) That nevertheless the Commissioner of Corporations and Taxation, in determining the excise tax upon your petitioner for the year 1922, included said stock of said two corporations among the assets employed in business within the commonwealth by your petitioner, and by virtue of such inclusion assessed upon your petitioner an excise tax for said year in the sum of $34,292.25, whereas if said stock had not been included as aforesaid the tax which would have been, and in accordance with law should have been, assessed upon your petitioner would have amounted to but $19,827.87, or $14,464.38 less than the tax actually assessed.

(8) That of said tax part, namely $12,806.88, was assessed and paid in regular course, and the remainder or $21,485.37 was assessed as an additional tax in April, 1924, and was paid by your petitioner upon compulsion and under duress, and after protest in writing, on May 17, 1924.

(9) That your petitioner is aggrieved by the exaction of part of said excise, namely $14,464.38, for the reason

that the inclusion of said stocks of foreign corporations among the assets employed in business in this commonwealth was not authorized by the statute; and that if authorized by statute it would be none the less illegal and void as an attempt to reach by taxation property not within the jurisdiction of the commonwealth, in violation of the Fourteenth Amendment to the Constitution of the United States. [fol. 11] Wherefore your petitioner prays that such portion of said excise as was assessed without authority of law be abated, and that the amount so illegally exacted be repaid to it, with interest and costs.

By Its Attorneys Philip Nichols, Putnam B. Smith, Joseph A. Boyer.

In Supreme Judicial Court of Massachusetts

Answer—Filed January 7, 1925

The respondent for answer to the petition in the above cause says as follows:

1. The respondent admits the allegations of paragraph 1 of the petition.

2. The respondent denies the allegations of paragraph 2 of the petition. It says that the petitioner filed no return within the first ten days of April, 1922, as of April first, as required by G. L., c. 63.

3. The respondent admits that the petitioner on April 1, 1922, and continuously since its incorporation was engaged in business on its own account and that on said date it also owned and held shares of stock in the National Calfskin Company and the A. C. Lawrence Leather Company, both organized under the laws of the State of Maine, as alleged in paragraph 6 of the petition. It denies that said securities were not employed in any business within the Commonwealth on said date, and denies all the other allegations in said paragraph. It further alleges that the petitioner and said other two corporations were both actually engaged in business in the Commonwealth on said date, that said securities were held in the Commonwealth, and

that said other two corporations were subsidiary companies of the petitioner.

4. The respondent admits that the Commissioner of Corporations and Taxation, in determining the value of the corporate excess employed within the Commonwealth for the purpose of computing the excise tax upon the petitioner for the year 1922, included said stock of said other two corporations among the assets employed in business within the Commonwealth by the petitioner, as alleged in paragraph 7 of the petition. It denies the remaining allegations of said paragraph.

[fol. 12] Further answering the respondent says that during the period in question the petitioner carried on no business outside the Commonwealth, and that the value of the securities in question was accordingly allocated to Massachusetts, but that the Commissioner did not allocate to Massachusetts securities owned by the petitioner of other corporations which were not engaged in business within the Commonwealth.

The respondent further says that the Commissioner originally assessed to the petitioner an excise based on its corporate excess employed within the Commonwealth on April 1, 1922, in the sum of $12,806.88, and subsequently assessed an additional excise based on such corporate excess amounting to $21,485.37, making a total assessment of $34,292.25.

5. In answer to paragraph 8 of the petition the respondent says that the excise originally assessed in the sum of $12,806.88 was paid by the petitioner on October 20, 1922, and that the additional excise in the sum of $21,485.37, assessed on May 1, 1924, was paid by the petitioner under protest on May 17, 1924. The respondent denies all other allegations in said paragraph 8.

6. The respondent denies the allegations of paragraph 9 of the petition, and says that the taxes assessed were in every respect legal and valid.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

ORDER CONSOLIDATING CASES—JUNE 23, 1925

These cases came on to be heard at this sitting and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that said cases be, and the same are hereby, consolidated for the purpose of being heard together.

By the Court.

John F. Cronin, Clerk.

[Braley, J.]

[fol. 13] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

41617 Eq., 42124 Eq.

AGREED STATEMENT OF FACTS

It is agreed that such of the following facts as are competent, relevant and material are true, and that the court may draw inferences of fact from the facts herein stated:

1. These two petitions are for the abatement of excises assessed to the petitioner as a foreign corporation for the years 1922 and 1923.

2. The petitioner, National Leather Company, was organized under the laws of the State of Maine in the year 1919. Its original authorized capital was $30,000,000, which was afterwards reduced to $7,500,000, and new capital was secured by the issue of $13,000,000 of preferred stock. The petitioner's business during the years in question and prior and subsequent thereto was purchasing hides and skins having them tanned by other companies and selling the leather through the tanners. It operated no tanneries itself until the year 1924. The business of the company during said entire period was conducted wholly in Massachusetts, its business officers were located solely in Massachusetts, and it carried on no active business outside the State. About two-thirds of the hides and leather belonging to the petitioner at all times during its existence have been located outside Massachusetts.

3. A. C. Lawrence Leather Company, a corporation organized under the laws of the State of Maine, and National Calfskin Company, a corporation also organized under the laws of the State of Maine, are subsidiary companies of the petitioner, all of whose stock, except a few qualifying shares, is and has for many years been owned and held by the petitioner. During the period in question most of the petitioner's upper leather was tanned by A. C. Lawrence Leather Company and National Calfskin Company. Its sole leather was tanned and sold by other corporation, in most of which it had no interest by stock ownership or otherwise.

4. A. C. Lawrence Leather Company was organized in 1897 with an authorized capital of $200,000, increased thereafter from time to time to $5,000,000. In 1919 the entire capital stock, except a few qualifying shares, was sold to the petitioner and has since been owned and held by that company. The certificates representing this stock have continuously been actually held in Massachusetts. The business of A. C. Lawrence Leather Company since [fol. 14] its incorporation has been tanning hides, principally for upper leather for shoes, and selling the leather resulting therefrom on a commission basis, the hides and the leather resulting therefrom remaining the property of the consignor until the leather is sold. Since 1919 most of its tanning has been for the petitioner, although from time to time other companies have furnished hides which were tanned and sold by A. C. Lawrence Leather Company. During the whole period in question the company's tanneries were at Peabody, Massachusetts, and it was doing business continuously in the Commonwealth. It was qualified to do business in the States of Massachusetts, New York, Ohio, Missouri and Pennsylvania, and had selling branches with established offices in the cities of New York, Gloversville and Rochester, in the State of New York, Cincinnati, Ohio, St. Louis, Missouri, and Philadelphia, Pennsylvania; and in 1923 it was admitted to do business in Minnesota and established an office and selling branch at St. Paul in that state.

5. National Calfskin Company was organized in 1900 with authorized capital of $300,000, which was subsequently

increased from time to time to $2,500,000. In 1919 its entire capital stock, except a few qualifying shares, was sold to the petitioner and has since been owned and held by that company. The certificates representing this stock have continuously been actually held in Massachusetts. From 1900 to 1920 the business of National Calfskin Company was purchasing hides, which it tanned in its own plant, and selling the finished leather, which was principally upper leather for shoes, through A. C. Lawrence Leather Company on a commission basis. In 1920 and thereafter its business has been tanning hides belonging to National Leather Company. During the whole period in question the company's tannery was at Peabody, Massachusetts, and it was doing business continuously in the Commonwealth. Besides its State of incorporation it has during the period in question been qualified to do business in Massachusetts and in no other State, and it had during that period no selling branches and owned no property outside of Massachusetts.

6. The Commissioner of Corporations and Taxation, in determining that portion of the excise tax upon the petitioner for the year 1922 which is based upon the value of the corporate excess employed by it within the commonwealth, included the whole of the capital stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the petitioner as assets employed by the [fol. 15] petitioner in business within the Commonwealth. The Commissioner did not include any of the stocks owned by the petitioner of other corporations not engaged in business within the Commonwealth. The Commissioner originally assessed to the petitioner an excise for said year based on its corporate excess employed within the Commonwealth in the sum of $12,806.88, and subsequently assessed an additional excise based on such corporate excess amounting to $21,485.37, making a total assessment of $34,292.25. If the stock of A. C. Lawrence Leather Company and National Calfskin Company belonging to the petitioner had not been included in determining the value of the corporate excess, the excise which would have been assessed upon the petitioner would have been $19,827.89, or $14,464.36 less than the tax actually assessed.

7. The excise originally assessed in the sum of $12,806.88 was paid by the petitioner on October 20, 1922, and the additional excise in the sum of $21,485.37 assessed on May 1, 1924, was paid by the petitioner under protest in writing on May 17, 1924. It is to this additional excise that the proceeding in No. 42124 Equity relates, and a portion of which the petitioner seeks to have abated.

8. The Commissioner of Corporations and Taxation, in determining that portion of the excise tax upon the petitioner for the year 1923 which is based upon the value of the corporate excess employed by it within the Commonwealth, included the whole of the capital stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the petitioner as assets employed by the petitioner in business within the Commonwealth. The Commissioner did not include any of the stocks owned by the petitioner of other corporations not engaged in business within the Commonwealth. The Commissioner originally assessed to the petitioner an excise for the year 1923 based on its corporate excess employed within the Commonwealth in the sum of $21,676.49, and subsequently assessed an additional excise based on such corporate excess amounting to $9,042.67, making a total assessment of $30,719.16. If the stock of A. C. Lawrence Leather Company and National Calfskin Company belonging to the petitioner had not been so included in determining the value of the corporate excess, the excise which would have been assessed upon the petitioner would have been $17,299.48, or $13,419.68 less than the tax actually assessed.

9. Said excises, with interest amounting to $343.21, mak- [fols. 16 & 16a] ing a total of $31,062.37, were paid by the petitioner under protest in writing on April 6, 1924. It is to these excises that the proceedings in No. 41617 Equity relates, and a portion of which the petitioner seeks to have abated.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General. National Leather Company, by Its Attorneys, Philip Nichols, Putnam B. Smith.

Copy. Attest: —— ——, Clerk.

[fol. 17] In Supreme Judicial Court of Massachusetts

[Title omitted]

Rescript—Filed June 30, 1926

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz., Complaint dismissed.

By the Court.

Walter F. Frederick, Clerk.

June 28, 1926.

[fol. 17a] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the Reporter of Decisions, to which reference is made.

[File endorsement omitted.]

[fol. 18] In Supreme Judicial Court of Massachusetts

No. 41617. Equity.

[Title omitted]

Final Decree—November 29, 1926

This cause came on to be heard at this sitting after rescript from the Full Court, and thereupon, pursuant to the terms of said rescript, it is ordered, adjudged and decreed that the petition in said cause be dismissed without costs.

By the Court.

John F. Cronin, Clerk.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 20] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION

RUGG, C. J.:

These are petitions brought under G. L. c. 63, §77, for the recovery of portions of excise taxes levied for the years 1922 and 1923 under G. L. c. 63, § 39, upon a foreign corporation organized under the laws of Maine for the privilege of doing local business within this Commonwealth. During the years in question, the business of the petitioner was purchasing hides and skins, having them tanned by others, and selling the resulting leather through the tanners. Its business was conducted wholly in Massachusetts, its business offices were located here and it carried on no active business outside this Commonwealth. Among other properties the petitioner owned substantially the entire capital stock of the A. C. Lawrence Leather Company, and the National Calfskin Company, corporations also organized under the laws of Maine. The petitioner's upper leather was tanned chiefly by these two corporations, and its sole leather by other corporations in most of which it had no interest by stock ownership or otherwise. In 1919 the entire capital stock of both these corporations, except a few qualifying shares, was bought by the petitioner and has been since owned and held by it. The certificates representing that stock continuously have been actually held in Massachusetts. The business of the Lawrence Company has been tanning hides principally for upper leather for shoes and selling on a commisson basis the resulting leather, which remained the property of the consignor until sold. Its tanneries were at Peabody in this Commonwealth and it has been engaged here in business without interruption. Most, but not all, of its tanning since 1919 has been done for the petitioner. It was qualified to do business and had selling branches in four or five other States. The business of the Calfskin Company since 1920 has been tanning hides belonging to the petitioner. It has been qualified to do business in Massachusetts and in no other State aside [fol. 21] from the State of its incorporation. It had no selling branches and no property outside of Massachusetts. Its tannery has been at Peabody and it has constantly engaged here in business.

In determining the portion of the excise of the petitioner based upon the value of the corporate excess employed by it within the Commonwealth, the commissioner of corporations and taxation included the whole of the capital stock of the Lawrence Company and of the Calfskin Company owned by the petitioner as assets employed by it in business within the Commonwealth, but did not include any of the stocks owned by it in other corporations not engaged in business within the Commonwealth. These petitions are directed solely to the recovery of that portion of the excises assessed by reason of the inclusion of the capital stock of these subsidiary companies as assets employed by the petitioner in business within the Commonwealth. No other attack is made on the excises. The question of law for decision, as stated by the petitioner, "is whether any part of the value of such stocks should have been so included, and if so, what part." The question thus stated is essentially one as to the interpretation of the governing statutes. The commissioner of corporations and taxation in determining under G. L. c. 63, § 44, the "corporate excess employed within the Commonwealth, by every foreign corporation" doing domestic business here is required to give those words the definition and to follow the legislative mandate in G. L. c. 63, § 30, cl. 4, namely, "such proportion of the fair cash value of all the shares constituting the capital stock * * * [on a specified date] as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of" certain tangible properties not here relevant, and "Securities held in the Commonwealth, the income of which, if any, if received by a natural person resident therein, would not be liable to taxation," with exceptions not now pertinent. By §31 of c. 63, it is provided that in determin- [fol. 22] ing "the corporate excess employed within the Commonwealth by a foreign corporation, there shall not be deducted the value of shares in national banks and in voluntary associations, trust and partnerships, nor of other securities the income of which, if owned by a natural person resident in this Commonwealth, would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it

or for its benefit. * * *" Confessedly income from the shares of stock here in question, if owned by a natural person resident in this Commonwealth would be liable to taxation. G. L. c. 62, § 1 (b).

The petitioner held the stock in its two subsidiary corporations for the lawful prosecution of its business. All the facts recited lead to the conclusion that there was no error of law in including the shares of stock for computation of the excise of the petitioner. The entire business of the petitioner was conducted in this Commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner made use of the activities of the subsidiary corporations as essential parts of its business. Without discussing whether any one or more of those factors standing alone would justify the method employed in ascertaining the excise, their collective force is sufficient to that end.

The interpretation of the words of the statute requires this result. The definition of "Corporate excess" in G. L. c. 63, § 30, cl. 3, by the express provision that there shall be deducted the value of securities, the income of which would not be liable to taxation in the hands of a natural person, carries the implication that the value of other securities held by the corporation and not otherwise exempt shall not be deducted. The following section states the proposition [fol. 23] conversely and directs that in ascertaining the corporate excess the value of securities, the income of which if owned by a natural person would be liable to taxation, shall not be deducted. The language of the statute in these two sections is explicit and its meaning is not clouded or obscure. It cannot render subject to direct taxation property not within the jurisdiction; but where other essential elements are present the excise is justified.

Doubtless tax laws are to be interpreted, where reasonably practicable, so as not result in double taxation. Salem Iron Factory Co. v. Danvers, 10 Mass. 514. Tennessee v. Whitworth, 117 U. S. 129, 136. But the case at bar does not violate that principle. Whatever semblance to double taxation it may have is within the power of the Legislature. Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532. Cream of Wheat Co. v. Grand Forks, 253 U. S. 325. Apart

from the domicil of the several corporations and looking for the moment only at tangible property and its physical location, there is jurisdiction to sustain taxation in this Commonwealth. All the business of the petitioner and of one of its subsidiaries and a principal part of the business of the other subsidiary is conducted in Massachusetts. Direct taxation, however, is not here involved, because a part only of an excise or privilege tax is attacked.

General principles are well established to the effect that the situs of intangible personal property is at the domicil of the owner, that the domicil of a corporation is in the State where it is incorporated, and that property permanently located outside a State cannot be taxed. Bergner & Engel Brewing Co. v. Dryfus, 172 Mass. 154. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51, 57. Welch v. Treasurer & Receiver General, 223 Mass. 87. Hawley v. Malden, 232 U. S. 1. International Paper Co. v. Massa- [fols. 24 & 24a] chusetts, 246 U. S. 135. Those principles are accepted, but they do not govern the case at bar. Other principles which are controlling are equally well settled. Property may have a business situs separate from its theoretical situs. Even stock and intangible personal property may be treated as having a situs where actually kept, used and employed in business. Taxation on this theory has been upheld many times. Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395. Liverpool & London & Globe Ins. Co. v. Orleans Board of Assessors, 221 U. S. 346, 354. Bass, Ratcliff & Cretton, Ltd. v. State Tax Commission, 266 U. S. 271. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51, 58, 59, and cases there collected. It may be assumed that shares of stock in a foreign corporation cannot be taxed to a nonresident shareholder. Kennedy v. Hodges, 215 Mass. 112. In the case at bar there is no direct tax on property, but an excise on a foreign corporation, levied solely on the privilege of doing domestic business within this Commonwealth, measured in part on the value of stock employed in business in this Commonwealth. An excise or license tax may be measured in part by property which could not be taxed directly. Flint v. Stone Tracy Co. 220 U. S. 107, 165. Kansas City, Fort Scott & Memphis Railway v. Kansas, 240 U. S. 227, 232. Greiner v. Lewellyn, 258 U. S. 384, 387.

The question, whether the value of the stock of the Lawrence Company attributable to that part of its business and property in other States ought to have been deducted, is not presented on this record. That relates to overvaluation, as to which a different remedy is provided. American Hide & Leather Co. v. Commonwealth, 252 Mass. 345, 346, and cases there collected. G. L. c. 63, § 71.

Complaint dismissed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 25] In Supreme Judicial Court of Massachusetts

No. 41617, Equity, & No. 42124, Equity (Consolidated)

[Title omitted]

Petition for Writ of Error and Assignments of Error—Filed February 25, 1927

Now comes the National Leather Company, plaintiff in the above entitled proceeding, and represents that on the twenty-ninth day of November, 1926 the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts entered final judgment herein in favor of the above named respondent and against the above named petitioner, in which judgment and in the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which more in detail will appear from the assignment of errors which is filed herewith.

And the petitioner further represents:

That the petitioner is a corporation organized under [fol. 26] the laws of the State of Maine, and has been duly authorized to do business in the Commonwealth of Massachusetts and has a usual place of business in said Commonwealth.

That it is the owner of substantially all of the stock of the A. C. Lawrence Leather Company and of the National Calfskin Company, both of said companies being corporations organized under the laws of the State of Maine, and authorized to do business in Massachusetts.

That both of said last named corporations are assessed for and have paid taxes to the Commonwealth of Massachusetts, assessed upon or with respect to all property tangible and intangible owned by them and within the jurisdiction of said commonwealth.

That the statutes of Massachusetts, providing for the taxation of foreign corporations, namely Chapter 63 of the General Laws, impose an annual excise tax upon every such corporation for the privilege of carrying on or doing business in said Commonwealth of five dollars for each thousand dollars of corporate excess employed within the commonwealth; and corporate excess employed within the commonwealth is defined by said statutes to mean such proportion of the fair cash value of all the shares constituting the capital stock of the corporation as the value of the assets, both real and personal, employed in any business within the commonwealth bears to the total assets of the corporation; that said statutes as construed by the highest court of said commonwealth further provide that [fol. 27] in determining the corporate excess employed within the commonwealth as aforesaid, there shall not be deducted securities, the income of which if owned by a natural person would be liable to taxation; and the statutes of said commonwealth, namely Chapter 62 of the General Laws, further provide that the income of the stock of corporations of the class to which A. C. Lawrence Leather Company and National Calfskin Company belong, if owned by natural persons, would be liable to taxation.

That in the years 1922 and 1923 the Commissioner of Corporations and taxation under authority of the foregoing statutes imposed upon the petitioner, and required it to pay, as an excise tax upon the privilege of carrying on or doing business in the Commonwealth of Massachusetts, a tax at the rate of five dollars per thousand upon its corporate excess employed by it within said Commonwealth, and in determining the corporate excess employed by it within said Commonwealth, said Commissioner included all of the stock of said A. C. Lawrence Leather Company and National Calfskin Company owned by plaintiff as assets employed by plaintiff in business in Massachusetts.

That said stocks of A. C. Lawrence Leather Company and National Calfskin Company owned by the National

Leather Company were not property within the jurisdiction of the Commonwealth of Massachusetts.

That petitioner seasonably instituted separate proceed-[fol. 28] ings in the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts to compel the Commonwealth of Massachusetts to repay that portion of said tax which was thus illegally assessed, for both the years 1922 and 1923; and said Court there after ordered that said two cases be and they thereupon were consolidated.

That all of the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court in said proceedings and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit the Supreme Judicial Court of the Commonwealth, and there decided adversely to the plaintiff's contentions and adversely to the existence of the Federal rights claimed.

Wherefore the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed, and that a transcript of the record, proceedings and papers in this suit duly authenticated may be sent to the Supreme Court of the United States.

And the petitioner files its assignment of errors as follows, to wit:

Assignment of Errors

(1) The Court erred in deciding that the provisions of Chapter 62 and 63 of the General Laws of Massachusetts [fol. 29] imposing an excise tax upon foreign corporations for the privilege of carrying on or doing business in Massachusetts measured by such proportion of the value of all the shares constituting their capital stock as the value of their assets employed in any business within said Commonwealth bore to the value of their total assets and requiring stocks of other foreign corporations owned by such corporations to be deemed assets employed in business within said Commonwealth for the purpose of determining the amount of said tax, were not in violation of the Fourteenth Amendment to the Constitution of the United States,

as depriving the plaintiff of its property without due process of law and denying to it the equal protection of the laws.

(2) The Court erred in deciding that the provisions of Chapters 62 and 63 of the General Laws of Massachusetts, imposing an excise tax upon foreign corporations for the privilege of carrying on or doing business in Massachusetts measured by such proportion of the value of all the shares constituting their capital stock as the value of their assets employed in any business within said Commonwealth bore to the value of their total assets, and authorizing stocks of A. C. Lawrence Leather Company and National Calfskin Company, both corporations organized under the laws of the State of Maine, owned by National Leather Company, a corporation organized under the laws of the State of Maine, to be deemed assets employed in business within the Commonwealth of Massachusetts by National Leather Company, for the purpose of determining the amount of said [fol. 30] tax, were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying to it the equal protection of the laws.

National Leather Company, by Its Attorneys, Philip Nichols, Putnam B. Smith, Joseph A. Boyer.

[File endorsement omitted.]

[fols. 31-35] Bond on writ of error for $500.00, approved and filed February 25, 1927, omitted in printing.

[fol. 36] Citation, in usual form, showing service on Arthur K. Reading, filed March 3, 1927, omitted in printing.

[fol. 37] In Supreme Judicial Court of Massachusetts

Præcipe for Transcript of Record—Filed March 17, 1927

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk:

Please incorporate into the transcript of the record, to accompany your return to the writ of error, the reservation to the Supreme Judicial Court, the petitions, answers, order of consolidation, agreed statement of facts, rescript and final decree, besides copies of petition for writ of error, assignments of error, bond and citation and proceedings thereon, and copy of opinion of full bench, the Counsel for the Plaintiff in error deeming the above portions of the record to be material to and necessary for a decision of the questions invoked.

Philip Nichols, Putnam B. Smith, Joseph A. Boyer, Attorneys for National Leather Co.

[fol. 38] Affidavit of Service

I, Joseph A. Boyer, one of the Counsel for the plaintiff in error, declare and state that I have served a copy of the foregoing præcipe on the respondent, by giving a copy thereof in hand to "F. D. Putnam, Esquire, Assistant Attorney General," of Counsel for the defendant in error, at his usual place of business at the State House, Boston, on March 15, 1927.

Joseph A. Boyer.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, March 15, 1927.

Then personally appeared the above named Joseph A. Boyer and made oath that the foregoing statements by him subscribed are true.

Edward S. Farmer, Notary Public. (Seal of Commonwealth of Massachusetts.)

[File endorsement omitted.]

[fol. 39] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 41617

[Title omitted]

WAIVER OF PRÆCIPE—Filed March 23, 1927

Now comes the respondent in the above-entitled cause and waives its right to file a præcipe under paragraph 2 of section 1 of Rule 9 of the Supreme Court of the United States.

Commonwealth of Massachusetts, by F. Delano Putnam, Assistant Attorney General.

[fol. 40] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT THE ENTIRE RECORD—Filed April 9, 1927

Now comes the plaintiff in error herein and designates the following points as those on which it intends to rely:

(1) That it is not within the power of a State to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax shares of stock of other foreign corporations owned by such foreign corporation.

(2) That it is not within the power of a State to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax shares of stock of other foreign corporations owned by such foreign corporation, when the shares of stock of such corporations and all of their assets, so far as they are situated [fol. 41] within the State, are themselves taxed.

(3) That it is not within the power of a State to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax the shares of stock of other foreign corporations owned by such foreign corporation, when such shares of stock, as dis-

tinguished from the assets of such foreign corporation, have no business situs or other situs in such State.

Philip Nichols, Attorney for Plaintiff in Error.

[fol. 42] Statement of Parts of Record to be Printed

Comes now the plaintiff in error herein and designates the following as the parts of the record which it considers necessary to the consideration of the points on which it intends to rely, and the parts of the record to be printed:

All of the record forwarded by the Clerk of the Supreme Court of the Commonwealth of Massachusetts with the exception only of all duplication, all repetition of titles, and all other obviously unimportant matter.

Philip Nichols, Attorney for Plaintiff in Error.

[fols. 43 & 44] Boston, Mass., April 6, 1927.

Receipt of copies of the foregoing Statement of Points and Statement of Parts of Record to be Printed is hereby acknowledged.

F. Delano Putnam, Asst. Attorney General of the Commonwealth of Massachusetts.

[fol. 45] [File endorsement omitted.]

Endorsed on cover: File No. 32,569. Massachusetts Supreme Judicial Court. Term No. 205. National Leather Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed March 28th, 1927. File No. 32,569.

INDEX.

	Page.
Reference to official report	1
Statement of ground of jurisdiction	1
(1) Date of judgment to be reviewed	1
(2) Specific claims advanced and rulings made in the lower court	1
(3) Reference to statute under which the jurisdiction of this court is invoked	2
(4) References to cases believed to sustain the jurisdiction of this court	2
Statement of the case	2
Statutes material to the case	6
Specification of assigned errors intended to be urged	8
Summary of argument	9
Argument	10
1. A state may not, under the guise of an excise on the privilege of doing a local business, impose a tax upon a foreign corporation which directly or indirectly reaches property not within the jurisdiction of the state imposing the tax	10
2. The inclusion of the stock of A. C. Lawrence Leather Company and National Calfskin Company among the assets employed by the plaintiff in error in business in Massachusetts for the purpose of measuring the corporate excess of the plaintiff in error taxable in Massachusetts was in effect the imposition of a tax upon such stock	12
3. The stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the plaintiff in error was not within the jurisdiction of Massachusetts	14
(*a*) A corporation has its domicile in the state which created it, and even if its prin-	

Page.

cipal, or only, place of business is in another state, it is still a foreign corporation within such state 14

(*b*) The primary situs of stock in a corporation is the domicile of the stockholder, and when one corporation owns stock in another, the situs of the stock so held is the state in which the corporation owning the stock was organized 14

(*c*) There are numerous cases in which the rule of mobilia sequuntur personam as applied to certain classes of intangible property has yielded to business situs; but the principle of business situs has hitherto never been applied to the stock of corporations 15

(*d*) The only plausible ground upon which it can be contended that the plaintiff in error is taxable on the stocks of the two other foreign corporations is that most of the assets of these corporations were located in Massachusetts and most of their business was carried on in that commonwealth 17

(*e*) Jurisdiction for tax purposes over the shares of a foreign corporation owned by a non-resident cannot, however, be made to rest on the situs of the corporate property or the doing of the corporate business within the taxing state 18

(*f*) The "corporate fiction" cannot constitutionally be disregarded and the plaintiff in error treated as the owner of the property of its subsidiaries or as carrying on business through them as its agents because it owns all of their corporate stock, when such

Page.

a course is not necessary to do justice, but will work gross injustice by taxing the same property twice 19

4. The decision of the Supreme Judicial Court of Massachusetts rests upon a misconstruction of the statute which, if controlling, renders the statute clearly unconstitutional 22

LIST OF CASES CITED.

A. C. Lawrence Leather Co. v. Commonwealth, 254 Mass. 609 21
Alpha Cement Co. v. Massachusetts, 268 U.S. 203 12
Bank of Augusta v. Earle, 13 Pet. 519 14
Berger & Engel Brewing Co. v. Dreyfus, 172 Mass. 154 14
Boston Investment Co. v. Boston, 158 Mass. 461 14
Bristol v. Washington County, 177 U.S. 133 15
Cannon Mfg. Co. v. Cudahy Co., 267 U.S. 333 19
Chicago &c. Ry. Co. v. Minneapolis Civic &c. Assn., 247 U.S. 490 20
Clark v. Treasurer & Receiver General, 218 Mass. 292 16
Conley v. Mathieson Alkali Works, 190 U.S. 406 19
DeGanay v. Lederer, 250 U.S. 376 15
Delaware &c. R.R. Co. v. Pennsylvania, 198 U.S. 341 11
Gardiner v. Treasurer & Receiver General, 225 Mass. 354 20
Hawley v. Malden, 232 U.S. 1 14
Insurance Co. v. Francis, 11 Wall. 210 14
International Paper Co. v. Massachusetts, 246 U.S. 135 11
Kennedy v. Hodges, 215 Mass. 112 16
Liverpool Insurance Co. v. Orleans Board of Assessors, 221 U.S. 346 15
Loeb v. Columbia Township Trustees, 179 U.S. 482 2

Page.
Looney v. Crane Co., 245 U.S. 178 11
Marsch v. Southern New England R.R. Co., 230 Mass. 483 19
McCaskill Co. v. United States, 216 U.S. 504 20
Merrick v. Van Santvoord, 34 N.Y. 208 14
Metropolitan Life Insurance Co. v. New Orleans, 205 U.S. 395 15
New Orleans v. Stempel, 175 U.S. 309 15
People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 19
Peterson v. Chicago &c. R.R. Co., 205 U.S. 364 19
Philadelphia &c. Ry. Co. v. McKibben, 243 U.S 264 19
Pittsburg & Buffalo Co. v. Duncan, 232 Fed. 585 20
Rhode Island Trust Co. v. Doughton, 270 U.S. 69 14, 18, 22, 25
Salomon v. Salomon &c. Co., Ltd., [1897] A.C. 22 19
Scottish Insurance Co. v. Bowland, 196 U.S. 611 15
Seymour v. Spring Forest Cemetery Association, 144 N.Y. 333 20
Southern Railway Co. v. Kentucky, 274 U.S. 76 11
State Board of Assessors v. Comptoir Nationale D'Escompte, 191 U.S. 388 15
Sturgis v. Carter, 114 U.S. 511 14
Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 11
United States v. Delaware &c. R.R. Co., 238 U.S. 516 20
United States v. Lehigh Valley R.R. Co., 220 U.S. 257 20
United States v. Reading Co., 253 U.S. 26 20
Welch v. Treasurer & Receiver General, 223 Mass. 87 16
Western Union Tel. Co. v. Kansas, 216 U.S. 1 11
Wright v. Louisville & Nashville R.R. Co., 236 U.S. 687 15

LIST OF AUTHORITIES CITED.

	Page.
Judicial Code, § 237 (*a*), as amended by the Act of February 13, 1925	2
General Laws, c. 59 § 5, 16	4
General Laws, c. 59, § 10	4
General Laws, c. 59, § 18, 2	4
General Laws, c. 62, § 1 (*b*)	8
General Laws, c. 63, § 30, 2, 4, (*a*), (*b*)	6
General Laws, c. 63, § 30, 4 (*b*)	21
General Laws, c. 63, § 31	7
General Laws, c. 63, § 39 (1), (2)	7
General Laws, c. 63, § 77	7
XXV Michigan Law Review, 278	22

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 205.

NATIONAL LEATHER COMPANY, PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

REFERENCE TO OFFICIAL REPORT.

The opinion of the Supreme Judicial Court for the State of Massachusetts, from which the writ of error was taken, is reported in 256 Massachusetts Reports, 419.

STATEMENT OF GROUND OF JURISDICTION.

(1) *Date of judgment to be reviewed.* November 29, 1926 (Record, p. 16).

(2) *Specific claims advanced and rulings made in the lower court.* The plaintiff in error made the specific claim, as appears by its pleadings, that the inclusion of stocks of corporations foreign to Massachusetts among the assets employed in business by the plaintiff in error in Massachusetts for the purpose of measuring its excise tax was

illegal and void as an attempt to reach by taxation property not within the jurisdiction of Massachusetts, in violation of the Fourteenth Amendment to the Constitution of the United States (Record, p. 10). The court ruled that the stocks of such corporations constituted assets employed in business in Massachusetts and were properly included in determining the tax on plaintiff in error, and that the statute so construed was not in violation of the Constitution of the United States.

(3) *Reference to statute under which the jurisdiction of this court is invoked.* Section 237 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925, which provides as follows:

> "A final judgment or decree in any suit in the highest court of a State . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(4) *References to cases believed to sustain the jurisdiction of this court.* It was held in *Loeb* v. *Columbia Township Trustees,* 179 U.S. 482, that the unsuccessful litigant may come to this court direct in every case in which a claim has been made by him that is substantial and has not been decided by this court, that a statute which adversely affects his rights is in contravention of the Constitution of the United States.

Statement of the Case.

This case originated as two separate statutory proceedings, relating to the years 1922 and 1923, respectively, seeking the refundment of a portion of the corporation excise taxes assessed upon the plaintiff in error for the

two years in question. The two cases involved the same question, and were subsequently consolidated by order of court. The case thus consolidated came on to be heard before a single justice of the Supreme Judicial Court on an agreed statement of facts, and was reserved by him on the pleadings and agreed statement of facts for the determination of the full court. The full court after argument ordered the petition to be dismissed.

The facts thus agreed upon were in substance as follows:

The plaintiff in error, National Leather Company, was organized under the laws of the State of Maine, and during the years in controversy had an authorized capital of $20,500,000. Its business was purchasing hides and skins and having them tanned by other companies and selling the leather through the tanners. It operated no tanneries itself during the years in question. Its business was conducted wholly in Massachusetts, and it carried on no active business outside the state, but about two thirds of the hides and leather belonging to the plaintiff in error at all times during its existence have been located outside Massachusetts.

The plaintiff in error owned, among its other properties, substantially the entire capital stock of two corporations, both also organized under the laws of the State of Maine, namely, the A. C. Lawrence Leather Company and the National Calfskin Company. During the period covered by the taxes in controversy most of the upper leather of the plaintiff in error was tanned by these two companies, and its sole leather was tanned and sold by other corporations, in most of which it had no interest by stock ownership or otherwise. A. C. Lawrence Leather Company during the period in question had an authorized capital stock of $5,000,000. It had been organized in 1897, but in 1919 the entire capital stock, except a few qualifying shares, was purchased by the plaintiff in error. The certificates representing the stock have continuously been physically held in

Massachusetts. The business of the A. C. Lawrence Leather Company since its incorporation has been tanning hides principally for upper leather for shoes, and selling the leather resulting therefrom on a commission basis, the hides and the leather resulting therefrom remaining the property of the consignor until the leather was sold. Since 1919 most, but not all, of its business has been for the plaintiff in error. During the whole period in question the tanneries of the A. C. Lawrence Leather Company were in Massachusetts, but it was qualified to do business, and had selling branches, in a number of other states as well.

National Calfskin Company was organized in 1900, and at the period in controversy its authorized capital was $2,500,000. In 1919 its entire capital stock, except a few qualifying shares, was sold to the plaintiff in error, and the certificates representing this stock have continuously been physically held in Massachusetts. Since 1920 its business has been tanning hides belonging to the National Leather Company. Its tannery was in Massachusetts, and it was not qualified to do business in any states except Maine and Massachusetts, and it had no selling branches and no property outside of Massachusetts.

The system employed in Massachusetts of taxing foreign corporations is in substance as follows:

The corporation is taxed on its real estate and machinery in the city or town in which such property is located. General Laws, c. 59, § 5, cl. 16; § 10; § 18, cl. 2. In addition, the corporation is required to pay annually "with respect to the carrying on or doing of business by it within the commonwealth" an excise tax consisting of—

> (1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.
>
> (2) An amount equal to two and one half per cent of that part of its net income which is derived from business carried on within the commonwealth.

The present case relates wholly to the first branch of the excise tax, namely, the "corporate excess employed by it [the taxpayer] within the commonwealth."

The statutes require three separate steps in computing for the purposes of the foregoing tax the corporate excess employed by the taxpayer within the commonwealth:

(1) The determination of the fair cash value of all the shares constituting the capital stock of the taxpayer corporation.

(2) The determination of the proportionate part of the value of all such shares as the value of the assets employed by the taxpayer in business within the commonwealth bears to the value of the total assets.

(3) The deduction of certain items from the figure thus reached, such items consisting primarily of real estate and machinery within the commonwealth and locally taxed and tax-exempt securities.

The present case relates wholly to the second step in the computation. The Commissioner of Corporations and Taxation, in determining the proportion of the capital stock of the plaintiff in error subject to taxation, included the whole of the capital stock of A. C. Lawrence Leather Company and National Calfskin Company owned by plaintiff in error as assets of the plaintiff in error employed by it in business in Massachusetts, and as a result the tax on plaintiff in error in 1922 was $14,464.36 greater than it would have been if such stocks had not been so included, and in 1923 was $13,419.68 greater than if said stocks had not been so included.

It is further to be noted that the two corporations whose stock was so held were themselves liable to taxation under the same statutes, so that the effect of this method of computing the tax upon plaintiff in error was to tax the same property twice.

The plaintiff in error paid the entire amount of the excises so assessed upon it, with interest, under protest, and

instituted the present proceeding to compel the refundment of that part of the two taxes which it contends was illegally assessed, namely, the portion of the tax based upon the inclusion of the stocks of the two corporations among the assets employed by the plaintiff in error in business in Massachusetts, the proceeding being the appropriate one under the state statutes and procedure. The Supreme Judicial Court of Massachusetts sustained the action of the Commissioner, holding that the statute authorized such inclusion and that so construed the statute did not violate the Constitution of the United States, and the taxpayer brought this writ of error.

The real question at the bottom of the case is whether a state may tax a non-resident on account of shares of stock in a foreign corporation owned by him, on the sole ground that the assets of such foreign corporation are within its jurisdiction, without violating the Fourteenth Amendment to the Constitution of the United States.

Statutes Material to the Case.

General Laws, Chapter 63:

Section 30. When used in this section and sections thirty-one to fifty-two inclusive, the following terms shall have the following meanings:

. . . . . .

2. "Foreign corporation," every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic coporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth. . . .

. . . . . .

4. "Corporate excess employed within the commonwealth" by a foreign corporation, such proportion of the fair cash value of all the shares constituting the capital

stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following:

(*a*) Works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee;

(*b*) Securities held in the commonwealth, the income of which, if any, if received by a natural person resident therein, would not be liable to taxation, . . .

. . . . . .

SECTION 31. In determining . . . the corporate excess employed within the commonwealth by a foreign corporation, there shall not be deducted the value of . . . securities, the income of which, if owned by a natural person resident in this commonwealth, would be liable to taxation. . . .

. . . . . .

SECTION 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, . . .

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth.

. . . . . .

SECTION 77. Any corporation, company or association aggrieved by the exaction of any tax or excise or any part

thereof may, within six months after the payment of the same, whether such payment be before or after the issue of the warrant mentioned in section seventy-two, apply by petition to the supreme judicial court, setting forth the amount of the tax or excise and costs thereon so paid, the general legal grounds and the specific grounds in fact, if any, upon which it is claimed such tax or excise should not have been enacted. Such petition shall be the exclusive remedy and shall be entered and heard in Suffolk County. A copy of the same shall be served upon the state treasurer and upon the attorney general. The proceedings upon such petition shall conform, as nearly as may be, to proceedings in equity, and an abatement shall be made of only such portion of the tax or excise as was assessed without authority of law.

Chapter 62:

SECTION 1. Income of the classes described in subsections (*a*), (*b*), (*c*) and (*e*) received by any inhabitant of the commonwealth during the preceding calendar year, shall be taxed at the rate of six per cent per annum.

. . . . . .

(*b*) Dividends . . . on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(1) That it is not within the power of a state to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax shares of stock of other foreign corporations owned by such foreign corporation.

(2) That it is not within the power of a state to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax shares of stock of other foreign corporations owned by such

foreign corporation, when the shares of stock of such corporations and all of their assets, so far as they are situated within the state, are themselves taxed.

(3) That it is not within the power of a state to levy a tax upon a foreign corporation doing business within its limits which includes as the measure or subject of the tax the shares of stock of other foreign corporations owned by such foreign corporation, when such shares of stock, as distinguished from the assets of such foreign corporation, have no business situs or other situs in such state.

Summary of Argument.

1. A state may not, under the guise of an excise on the privilege of doing a local business, impose a tax upon a foreign corporation which directly or indirectly reaches property not within the jurisdiction of the state imposing the tax.

2. The inclusion of the stock of A. C. Lawrence Leather Company and National Calfskin Company among the assets employed by the plaintiff in error in business in Massachusetts for the purpose of measuring the corporate excess of the plaintiff in error taxable in Massachusetts was in effect the imposition of a tax upon such stock.

3. The stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the plaintiff in error was not within the jurisdiction of Massachusetts.

(*a*) A corporation has its domicile in the state which created it, and even if its principal, or only, place of business is in another state, it is still a foreign corporation in such state.

(*b*) The primary situs of stock in a corporation is the domicile of the stockholder, and when one corporation owns stock in another, the situs of the stock so held is the state in which the corporation owning the stock was organized.

(*c*) There are numerous cases in which the rule of *mobilia sequuntur personam* as applied to certain classes of intangible property has yielded to business situs; but the principle of business situs has hitherto never been applied to the stock of corporations.

(*d*) The only plausible ground upon which it can be contended that the plaintiff in error is taxable on the stocks of the two other foreign corporations is that most of the assets of those corporations were located in Massachusetts and most of their business was carried on in that commonwealth.

(*e*) Jurisdiction for tax purposes over the shares of a foreign corporation cannot, however, be made to rest on the situs of the corporate property or the doing of the corporate business within the taxing state.

(*f*) The "corporate fiction" cannot constitutionally be disregarded and the plaintiff in error treated as the owner of the property of its subsidiaries or as carrying on business through them as its agents when such a course is not necessary to do justice, but, on the contrary, will work gross injustice by taxing the same property twice.

4. The decision of the Supreme Judicial Court of Massachusetts rests upon a misconstruction of the statute which, if controlling, renders the statute clearly unconstitutional.

Argument.

1. A STATE MAY NOT, UNDER THE GUISE OF AN EXCISE ON THE PRIVILEGE OF DOING A LOCAL BUSINESS, IMPOSE A TAX UPON A FOREIGN CORPORATION WHICH DIRECTLY OR INDIRECTLY REACHES PROPERTY NOT WITHIN THE JURISDICTION OF THE STATE IMPOSING THE TAX.

It is well settled that a state cannot tax property which is not within its jurisdiction, since such a tax is a deprivation of property without due process of law.

Union Refrigerator Transit Co. v. *Kentucky,* 199 U.S. 194.
Southern Railway Co. v. *Kentucky,* 274 U.S. 76.

Even in the case of a domestic corporation, when the capital stock of the corporation is taxed, the value of the property of the corporation located outside the state must be deducted.

Delaware &c. R.R. Co. v. *Pennsylvania,* 198 U.S. 341.

The foregoing principles have been frequently applied in recent years to excise taxes on foreign corporations, and it is now well settled that a state cannot require of a foreign corporation, as a condition of doing even a purely local business within its limits, that it pay an excise tax upon or measured by property not within the jurisdiction of the state.

Thus it was held in *Western Union Tel. Co.* v. *Kansas,* 216 U.S. 1, 26, 38, that a state cannot by any device or in any way, whether by a license tax or otherwise, tax property located beyond its limits, and may tax the property of a foreign corporation regularly or permanently located within its limits only when the ascertainment of the amount to be assessed is made dependent in fact upon the value of the property of the corporation situated within the state.

In *Looney* v. *Crane Co.,* 245 U.S. 178, 188, it was said that it was beyond the power of a state to use its power to exclude a foreign corporation to tax the property of the corporation outside of and beyond the jurisdiction of the state, in disregard of the due-process clause of the Fourteenth Amendment.

In *International Paper Co.* v. *Massachusetts,* 246 U.S. 135, 141, it was said by the court that, consistently with the due-process clause, a state cannot tax property of a foreign

corporation neither located nor used within the confines of the state; and that a state cannot require a foreign corporation, as a condition of the right to do a local business therein, to submit to a tax on its property outside the state.

In *Alpha Cement Co.* v. *Massachusetts*, 268 U.S. 203, 218, it was said by the court that the Fourteenth Amendment does not permit the taxation of property beyond the jurisdiction of the state, and that the local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. This decision held the statute under consideration in the present case unconstitutional when applied to a foreign corporation engaged solely in interstate commerce.

The foregoing decisions amply sustain the fundamental proposition relied on by the plaintiff in error.

2. THE INCLUSION OF THE STOCK OF A. C. LAWRENCE LEATHER COMPANY AND NATIONAL CALFSKIN COMPANY AMONG THE ASSETS EMPLOYED BY THE PLAINTIFF IN ERROR IN BUSINESS IN MASSACHUSETTS FOR THE PURPOSE OF MEASURING THE CORPORATE EXCESS OF THE PLAINTIFF IN ERROR TAXABLE IN MASSACHUSETTS WAS IN EFFECT THE IMPOSITION OF A TAX UPON SUCH STOCK.

There can be no doubt that the tax complained of in the present case reaches the stock in the A. C. Lawrence Leather Company and the National Calfskin Company.

It is to be remembered that the "corporate excess" under the Massachusetts law is not merely the amount by which the value of the aggregate capital stock exceeds the net value of all assets of the corporation, as in some jurisdictions, which excess is made up wholly of "good-will" or "franchise value" or something equally intangible. Under the Massachusetts law corporate excess is the amount by which the value of the aggregate capital stock exceeds the

value of the fixed assets, such as real estate and machinery, and the non-taxable securities only, and consequently tangible personal property and taxable securities are included in the corporate excess, as well as good-will and franchise value. The corporate excess of a foreign corporation doing business in Massachusetts thus determined is allocated to Massachusetts in the same proportion that the assets employed in business in Massachusetts bear to the entire assets. Thus, if the total value of the capital stock of a corporation was $1,000,000 and the value of the assets was also $1,000,000, and $400,000 of the assets were employed in business in Massachusetts, $400,000 of the value of the stock would be allocated to Massachusetts, and fixed assets locally taxed in Massachusetts and non-taxable securities would be deducted from that sum. If, however, the value of the stock was $1,500,000 and the value of the assets was the same as in the previous illustration, the same proportion, namely, four tenths, would be applied, and $600,000 of the value of the stock would be allocated to Massachusetts, subject to the same deductions as before.

Under the Massachusetts system, therefore, the determination of the situs of the assets of a foreign corporation not only establishes the apportionment of the good-will or franchise value, if any, as between Massachusetts and other states in which the corporation owns property or does business, but, with respect to tangible personal property and securities which would be taxable if owned by an individual resident, it settles the question whether the property is to be taxed by Massachusetts or not; and the inclusion of the stock of A. C. Lawrence Leather Company and National Calfskin Company among the "assets employed in business in Massachusetts" by the plaintiff in error was thus in effect the direct taxation of such stock in the hands of the plaintiff in error.

3. THE STOCK OF A. C. LAWRENCE LEATHER COMPANY AND NATIONAL CALFSKIN COMPANY OWNED BY THE PLAINTIFF IN ERROR WAS NOT WITHIN THE JURISDICTION OF MASSACHUSETTS.

(*a*) *A corporation has its domicile in the state which created it, and even if its principal, or only, place of business is in another state, it is still a foreign corporation within such state.*

This principle is so well established that it needs the citation of but few cases to substantiate it.

Bank of Augusta v. *Earle*, 13 Pet. 519, 588.
Insurance Co v. *Francis*, 11 Wall. 210.
Rhode Island Trust Co. v. *Doughton*, 270 U.S. 69, 84.
Boston Investment Co. v. *Boston*, 158 Mass. 461.
Berger & Engel Brewing Co. v. *Dreyfus*, 172 Mass. 154 (per Holmes, J.).
Merrick v. *Van Santvoord*, 34 N.Y. 208, 218.

Therefore the three corporations involved in this case must be treated as domiciled in the State of Maine, and not elsewhere.

(*b*) *The primary situs of stock in a corporation is the domicile of the stockholder, and when one corporation owns stock in another, the situs of the stock so held is the state in which the corporation owning the stock was organized.*

It is well settled that, although stock in a corporation may be constitutionally taxed by the state in which it was organized, the primary situs of the stock is the domicile of the stockholder.

Sturgis v. *Carter*, 114 U.S. 511.
Hawley v. *Malden*, 232 U.S. 1.

When one corporation owns stock in another, the situs of the stock so held is the state in which the corporation owning the stock was organized.

Wright v. *Louisville & Nashville R.R. Co.*, 236 U.S. 687.

(c) *There are numerous cases in which the rule of mobilia sequuntur personam as applied to certain classes of intangible property has yielded to business situs; but the principle of business situs has hitherto never been applied to the stock of corporations.*

It is true that there is a certain line of decisions holding that, when capital in the form of intangible property is regularly employed in business within a state, such property may be subject to taxation in such state although the owner is a non-resident or a foreign corporation. But these cases are confined to credits in the form of notes or otherwise in the hands of an agent for investment and reinvestment in the regular course of business, and on such facts it has several times been held that the capital thus invested has acquired a business situs in the state.

New Orleans v. *Stempel*, 175 U.S. 309.
Bristol v. *Washington County*, 177 U.S. 133.
State Board of Assessors v. *Comptoir Nationale D'Escompte*, 191 U.S. 388.
Scottish Insurance Co. v. *Bowland*, 196 U.S. 611.
Metropolitan Life Insurance Co. v. *New Orleans*, 205 U.S. 395.
Liverpool Insurance Co. v. *Orleans Board of Assessors*, 221 U.S. 346.
DeGanay v. *Lederer*, 250 U.S. 376.

This principle has never until the present case been extended to shares of stock in corporations.

The fact that the stock certificates happened to be kept in Massachusetts is of no importance, at least when the stock was not commonly bought, sold, or pledged by the taxpayer and there was no business advantage in keeping the stock certificates in any particular place.

Kennedy v. *Hodges,* 215 Mass. 112, 115.
Clark v. *Treasurer & Receiver General,* 218 Mass. 292.
Welch v. *Treasurer & Receiver General,* 223 Mass. 87, 92.

Whether a case might be imagined of a non-resident who owned a mass of corporate stocks which he kept within the state and who made a business of buying and selling such stocks, and investing and reinvesting the proceeds, and who was taxed on the capital so invested within the state, certainly no such case has ever come before the courts, and if it did arise it would be very different from the case at bar. In such a case the owner would be dealing with the stock certificates themselves as merchandise, and the stock, if taxable at all, would be taxable without regard to the state in which the corporations were organized or the state in which their property was located and their business was carried on; whereas in a case like the present the ownership of the stock is merely a means of enjoying a beneficial interest in the business and property of the corporations, and liability to taxation, if it exists at all, must be based on the residence of the taxpayer, the state in which the corporations were organized, or the state in which their property was located or their business carried on. The first two possible grounds of taxing jurisdiction admittedly do not exist in the present case.

(*d*) *The only plausible ground upon which it can be contended that the plaintiff in error is taxable on the stocks of the two other foreign corporations is that most of the assets of these corporations were located in Massachusetts and most of their business was carried on in that commonwealth.*

On a superficial study of the case one might say that, since the plaintiff in error was engaged in business only in Massachusetts, all of its assets held for business purposes must have been employed in business in Massachusetts, and this view of the case seems to have misled the state court. The fallacy of this argument is, however, obvious. If the facts were in all respects the same, except that the tanneries and other property of the two subsidiary companies were located outside of Massachusetts, no one would contend that the stock of such companies was taxable in Massachusetts when owned by a non-resident or a foreign corporation, merely because the non-resident or foreign corporation was doing business in Massachusetts. The Massachusetts taxing authorities concede that there would be no taxing jurisdiction in such case. See Record, page 14, in which it appears that the Commissioner did not include any of the stocks owned by the petitioner of other corporations not engaged in business in Massachusetts.

The liability of this stock to taxation, if it exists at all, must be based upon the fact that most of the property of the subsidiary corporations was located in Massachusetts, and most, and, in the case of one of the corporations, all, of their business was carried on in Massachusetts.

The case must therefore stand or fall on the proposition that a state may tax the shares of stock of a foreign corporation owned by a non-resident if the property of the corporation is located or its business is carried on within the limits of such state.

(e) *Jurisdiction for tax purposes over the shares of a foreign corporation owned by a non-resident cannot, however, be made to rest on the situs of the corporate property or the doing of the corporate business within the taxing state.*

The growing tendency of states to stretch their taxing jurisdiction to the utmost has finally reached to the point of an attempt by some states to base jurisdiction over the shares of stock of a foreign corporation owned by a non-resident on the ground that the property of the corporation was situated and its business was carried on within the taxing state. The Supreme Court of the United States, in a decision rendered after the present case was argued in the Supreme Judicial Court of Massachusetts, has, however, put a definite stop to this dangerous extension of the hitherto recognized limits on the taxing jurisdiction of the states, the court saying, in *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U.S. 69, at page 83:

> "But whatever the views of the other courts, that of this Court is clear: the stockholder does not own the corporate property. Jurisdiction for tax purposes over his shares cannot, therefore, be made to rest on the situs of part of the corporate property within the taxing state."

A statute of North Carolina seeking to subject to inheritance taxes the passing of stock of a foreign corporation owned by a non-resident decedent when 50% or more of its property was located within North Carolina was accordingly held to be unconstitutional, as an attempt to tax property not within the jurisdiction of the state, and thus constituting a deprivation of property without due process of law.

This case is, it is submitted, decisive of the case now under consideration.

(*f*) *The "corporate fiction" cannot constitutionally be disregarded and the plaintiff in error treated as the owner of the property of its subsidiaries or as carrying on business through them as its agents because it owns all of their corporate stock, when such a course is not necessary to do justice, but will work gross injustice by taxing the same property twice.*

It remains to be considered whether the established rule that taxing jurisdiction over the shares of a corporation cannot be predicated upon the situs of the property of the corporation may be disregarded by a state when all of the shares of the corporation are owned by one individual or by another corporation.

It is a general principle of the law of corporations that each corporation is a separate legal entity and must be regarded as such in all legal proceedings, even if all of its stock is owned by another corporation and the management is the same.

Conley v. *Mathieson Alkali Works,* 190 U.S. 406.
Peterson v. *Chicago &c. R.R. Co.,* 205 U.S. 364, 392.
Salomon v. *Salomon &c. Co., Ltd.,* [1897] A.C. 22.
Marsch v. *Southern New England R.R. Co.,* 230 Mass. 483, 498.

It is well settled that a corporation is not doing business within a state merely because a subsidiary corporation of which it owns all the stock is doing business in such state.

Philadelphia &c. Ry. Co. v. *McKibben,* 243 U.S. 264.
People's Tobacco Co. v. *American Tobacco Co.,* 246 U.S. 79.
Cannon Mfg. Co. v. *Cudahy Co.,* 267 U.S. 333.

It is true that an exception to the rule that each corporation is to be treated as a separate legal entity is recognized and that the courts will disregard the "corporate fiction" when such a course is necessary to prevent fraud or the evasion of taxation, or when the corporate identity is being used as a shield to conceal and pervert the truth.

> *McCaskill Co.* v. *United States,* 216 U.S. 504, 515.
> *Pittsburg & Buffalo Co.* v. *Duncan,* 232 Fed. 585.
> *Gardiner* v. *Treasurer & Receiver General,* 225 Mass. 354, 367.
> *Seymour* v. *Spring Forest Cemetery Association,* 144 N.Y. 333, 340.

So also it has several times been held that, when ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relations between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require.

> *United States* v. *Lehigh Valley R.R. Co.,* 220 U.S. 257, 272, 273.
> *United States* v. *Delaware &c. R.R. Co.,* 238 U.S. 516, 529.
> *Chicago &c. Ry. Co.* v. *Minneapolis Civic &c. Assn.,* 247 U.S. 490, 501.
> *United States* v. *Reading Co.,* 253 U.S. 26, 63.

No such case exists here. On the contrary, the Massachusetts Commissioner of Corporations and Taxation has sought to disregard the corporate fiction, not for the purpose of preventing fraud, or an evasion of taxation, or of doing justice, but as a device for enabling him to tax the same property twice.

While it is not expressly stated in the agreed statement of facts that the A. C. Lawrence Leather Company and the National Calfskin Company were themselves taxed in Massachusetts, it necessarily follows from what is stated that they were so taxed, for it was agreed that they were and had for many years been qualified to do business in Massachusetts and owned tanneries in that commonwealth (Record, pp. 13, 14), and the statutes provide for the taxation of all foreign corporations, making no exception in favor of corporations whose stock is taxed by the commonwealth; and the Supreme Judicial Court of Massachusetts conceded that it was a case of double taxation (Record, p. 19). In fact, it expressly appears in 254 Mass. 609, that these two subsidiaries were taxed by the Commonwealth in the years in question.

The Massachusetts tax laws have been drawn up with scrupulous care to provide that all property shall be taxed once, but only once; and it is believed that there is not another instance under the laws of Massachusetts in which the same property is taxed twice in the same year. If the subsidiaries had been domestic corporations, the value of the stock would have been deducted from the corporate excess. General Laws, c. 63, § 30, 4 (*b*). The present case, therefore, is not only one of double taxation, but of double taxation coupled with an arbitrary discrimination.

If the commonwealth is justified in disregarding the "corporate fiction," it should carry such disregard to its logical conclusion and tax affiliated companies on their combined assets and corporate excess, and not recognize the corporate fiction in taxing the subsidiaries and disregard it in taxing the parent corporation and thus in effect tax the same property twice when all other property in the commonwealth is taxed but once.

There is a peculiar injustice in the application of this tax in that the value of the tanneries—the real estate and machinery—which are locally taxed, is deducted from the

value of the corporate excess of the corporations which own them, and if the plaintiff in error was treated throughout as the owner of the assets, instead of the stock, of the subsidiaries, the tanneries as well as the other property of the subsidiaries would be taxed but once. But here, while it is treated as the owner of the assets of the subsidiaries situated in Massachusetts for the purpose of acquiring taxing jurisdiction, it is treated as the owner of the stock of the subsidiaries for the purpose of measuring the tax, so that the value of the assets locally taxed cannot be deducted from its corporate excess.

While this double taxation and arbitrary discrimination may not in themselves be unconstitutional, this inequitable result shows clearly that this is no case for disregarding the corporate fiction in order to do justice, and the established principle that each corporation is to be treated as a corporate entity must prevail. It is not a case in which a state should be allowed to violate the principle laid down in *Rhode Island Hospital Trust Co.* v. *Doughton, supra,* on any plea of equity or substantial justice.

4. The decision of the Supreme Judicial Court of Massachusetts rests upon a misconstruction of the statute which, if controlling, renders the statute clearly unconstitutional.

The decision of the Supreme Judicial Court of Massachusetts in the present case is, as already pointed out, a startling extension of the limits of a state's taxing power as hitherto understood, and has been severely criticized by students of the problems arising from the conflicting tax jurisdictions of the several states. See, for example, XXV Michigan Law Review, 278. It is but fair to state that the decision in *Rhode Island Hospital Trust Co.* v. *Doughton, supra,* which was decided after the National Leather Company case was argued, but before it was decided, was not called to the attention of that court. But such weight as

might ordinarily be given to a decision of the Supreme Judicial Court of Massachusetts is much lessened by the fact that the decision in this case is patently based upon a misconstruction of the statute which, while it compelled the conclusion which was reached as to the construction of the statute, rendered the statute so construed clearly and obviously unconstitutional.

As already pointed out, the determination of the corporate excess of a foreign corporation employed in business in Massachusetts for the purposes of the excise tax requires three separate and distinct steps:

(1) The determination of the value of all the shares constituting the capital stock.

(2) The valuation of all the assets wherever situated and the segregation of the assets employed in business in Massachusetts, and the allocation to Massachusetts of the same proportion of the value of all the stock as the value of the assets employed in business in Massachusetts bears to the value of all the assets.

(3) The deduction from the figure thus obtained of the value of fixed assets locally taxable, and securities which would be exempt from taxation in the hands of an individual resident of Massachusetts.

To make the latter deduction doubly clear, the statute expressly provides that the value of stocks of corporations which would be taxable in the hands of an individual resident shall not be deducted.

The plaintiff in error at no time sought a deduction of the stocks of its subsidiaries under the third step, because it is well understood that in Massachusetts stocks of foreign corporations are taxable on their income in the hands of individual residents, and stocks of domestic corporations are not, and the subsidiaries of the plaintiff in error were foreign corporations. The present case relates only to the second step—the determination of what assets of the plaintiff in error were employed in business in Massachu-

setts in order to determine what proportion of the corporate excess should be allocated to Massachusetts.

Yet this is the reason assigned by the court for holding that the stocks of the subsidiaries should be included in the tax (Record, p. 19):

> "The interpretation of the words of the statute requires this result. The definition of 'Corporate excess' in G. L. c. 63, § 30, cl. 3, by the express provision that there shall be deducted the value of securities, the income of which would not be liable to taxation in the hands of a natural person, carries the implication that the value of other securities held by the corporation and not otherwise exempt shall not be deducted. The following section states the proposition conversely and directs that in ascertaining the corporate excess the value of securities, the income of which if owned by a natural person would be liable to taxation, shall not be deducted. The language of the statute in these two sections is explicit and its meaning is not clouded or obscure."

Inasmuch as deductions enter into the third step of the computation of the corporate excess only, and have nothing to do with the second step, it is apparent that the court wholly misconceived the issues of the case.

In considering this portion of the decision there are two alternatives: Either it must be disregarded altogether on the ground that it is obvious that the court misconceived the issues of the case, in which view no weight can be given to the decision, since it was plainly based on a misapprehension; or it must be accepted as a binding interpretation that, contrary to its apparent intent, the statute means that the stock of every foreign corporation owned by another foreign corporation doing business in the state must be treated as assets employed in business in Massachusetts and taxed to the owning corporation, without regard to the

location of the assets of the corporation whose stock was so owned, to the control or lack of control over such corporation, or the use made of the stock. Such a construction would render the statute unconstitutional beyond the shadow of a doubt.

But, however this may be, it is believed that, if there are any qualifications and exceptions to the rule of *Rhode Island Hospital Trust Co.* v. *Doughton,* and if under some circumstances a state may tax the stock of a foreign corporation owned by a non-resident because the corporation owns property and does business within its limits, it is most unlikely that the Supreme Court of the United States will allow the principle of that decision to be disregarded in order to enable a state to tax both the stock and the property at the same time.

Respectfully submitted,
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FILED
JAN 12 1928
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 205.

NATIONAL LEATHER COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, SITTING WITHIN AND FOR THE COUNTY OF SUFFOLK.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT IN ERROR.

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INDEX.

	Page.
Reference to opinion below	1
Grounds on which the jurisdiction of this court is invoked by the plaintiff in error	2
Statement of the case	2
Summary of argument	9
Points and authorities	11
I. The Commissioner of Corporations and Taxation has determined as a matter of fact that the shares of stock in the subsidiary corporations were assets of the plaintiff in error actually employed in business in Massachusetts. His finding should not be upset unless plainly wrong as a matter of fact or unless as a matter of law shares of stock are assets incapable of being employed in business outside the State of the domicil either of the corporation owning or of that issuing the shares	11
A. The statute requires the Commissioner to determine what assets are employed in business within Massachusetts	11
B. The Supreme Judicial Court of Massachusetts has found as a matter of law that the provisions of General Laws, c. 63, §§ 30, 31, 39, and 44, are broad enough to include shares of foreign subsidiaries as assets of a foreign corporation employed in Massachusetts, and that the Commissioner was warranted in including the stocks owned by the plaintiff in error as assets employed in Massachusetts	12
II. It is within the power of a State to levy an excise tax upon a foreign corporation for the	

Page.

privilege of doing intrastate business within the State including as part of the measure of the tax intangible assets employed in business within the State by the taxpayer corporation. Such intangible assets may properly include shares of stock, belonging to the taxpayer, in foreign subsidiary corporations (if such shares are employed as capital of the taxpayer within the State) without in any way depriving the taxpayer corporation of its property without due process of law 13

A. The Massachusetts corporation tax, contained in General Laws (1921), c. 63, is an excise tax measured in part by corporate excess 13

B. Shares of stock may be used or employed by the owner of such shares in a State other than that of his domicil or that of the incorporation of the company issuing the shares 15

1. Shares of stock may be used in a place where they are subject to control. They may be subject to control outside the State of their technical situs 18

2. In a business sense, certificates of stock represent capital; they have an intrinsic value commensurate with the value of the shares which they represent—and thus may become the basis upon which the owner of shares is enabled to obtain credit at the place where the certificates are found 22

3. The ownership of shares in subsidiaries may well be for the purpose of exercising control of certain processes essential to the conduct of business within the taxing State by the parent company 25

4. Like other intangibles, shares of stock

Page.

may acquire a "Business Situs" outside the domicil either of the stockholder or of the corporation issuing the shares 26

III. The facts presented by the Record show clearly that the Commissioner of Corporations and Taxation was warranted in finding that the shares in the subsidiary companies were employed in business within Massachusetts during the years in question 32

TABLE OF CASES CITED.

Adams Express Co. v. Ohio State Auditor, 166 U.S. 185; s.c. 165 U.S. 194 14, 26

Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 33

Air Way Electric Appliance Corp. v. Day, 266 U.S. 71 15

Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 14

American Express Co. v. Indiana, 165 U.S. 255 26

American Mfg. Co. v. St. Louis, 8 Fed. (2d) 477 14

American Refrigerator Transit Co. v. Hall, 174 U.S. 70 14

Aschrott, Re, [1927] 1 Ch. 313 19

Bank of Augusta v. Earle, 13 Pet. 519 16

Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, 266 U.S. 271 15, 34

Beal v. Carpenter, 235 Fed. 273 20

Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51; writ of error dismissed, 245 U.S. 630 16, 20, 22, 30

Blackstone v. Miller, 188 U.S. 189 16, 28

Blake v. Foreman Bros. Banking Co., 218 Fed. 264 20, 22

Bristol v. Washington County, 177 U.S. 133 15, 27

Chase v. Wetzlar, 225 U.S. 79 20

Clark, Re, [1904] 1 Ch. 294 21

Page.
Cream of Wheat Co. v. Grand Forks, 253 U.S. 325 36
Crew Levick Co. v. Pennsylvania, 245 U.S. 292 12
Cudahy Packing Co. v. Minnesota, 246 U.S. 450 15
Cummings v. Clark, 282 Fed. 300 18
DeGanay v. Lederer, 250 U.S. 376; see s.c. below, 239 Fed. 568 15, 18, 19, 28
Disconto Gesellschaft v. U.S. Steel Corporation, 267 U.S. 22 19, 20
Edwards v. Chile Copper Co., 270 U.S. 452 25
Fidelity etc. Trust Co. v. Louisville, 245 U.S. 54 30
First National Bank of Hartford v. Hartford, 273 U.S. 548 33
Fiske v. Kansas, 274 U.S. 380 33
Flint v. Stone Tracy Co., 220 U.S. 107 17
Fort Smith Lumber Co. v. Arkansas, 251 U.S. 532 35
Franz v. Buder, 11 Fed. (2d) 854 21
Gates, Matter of, 243 N.Y. 193 19
Grayson v. Harris, 267 U.S. 352 33
Greiner v. Lewellyn, 258 U.S. 384 18
Griswold v. Kelly-Springfield Tire Co., 94 N.J. Eq. 308 20
Hawley v. Malden, 232 U.S. 1 15
Hump Hairpin Mfg. Co. v. Emmerson, Sec'y of State of Illinois, 258 U.S. 290 14
Insurance Co. v. Francis, 11 Wall. 210 16
Iowa v. Slimmer, 248 U.S. 115 21, 30
Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47 14
Kansas City etc. Ry. v. Botkin, 240 U.S. 227 17
Klein v. Wilson & Co., Inc., 7 Fed. (2d) 769 21
Liverpool etc. Ins. Co. v. Orleans Assessors, 221 U.S. 346 15, 28
Lockhart v. Dickey, 161 La. 282 21
Lockwood v. U.S. Steel Corporation, 209 N.Y. 375 21
Merritt v. American Steel Barge Co., 79 Fed. 228 20

Page.

Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395 15, 16, 28
National Leather Co. v. Commonwealth, 256 Mass. 419 1, 9
Neiler v. Kelly, 69 Pa. St. 403 20
Newell v. Tremont Lumber Co., 161 La. 649 21
New Orleans v. Stempel, 175 U.S. 309 15, 27, 28
New York, ex rel. Hatch, v. Reardon, 204 U.S. 152 19
Norrie v. Lohman, 16 Fed. (2d) 355; s.c. with comment 26 Michigan Law Review, 102 (Nov. 1927) 20
Northwestern Mut. Life Ins. Co. v. Wisconsin, U.S. Supr. Ct., Oct. term, 1927, Nos. 75, 76, dec. Nov. 21, 1927 18
Pantlind Hotel Co., In re, 232 Mich. 330 34
People, ex rel. Edison etc. Co., v. Campbell, 138 N.Y. 543 35
People, ex rel. Studebaker Co. etc., v. Gilchrist, 244 N.Y. 114 26
People, ex rel. Wynn, v. Grifenhagen, 167 App. Div. (N.Y.) 572 20
Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 14
Pullman Co. v. Richardson, 261 U.S. 330 15
Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 14
Puget Sound National Bank v. Mather, 60 Minn. 362 19
Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69 16, 26
Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50 34
Royal Mineral Ass'n v. Lord, 13 Fed. (2d) 227 36
Scottish etc. Ins. Co. v. Bowland, 196 U.S. 611 15, 16, 19, 23, 28
Shaffer v. Carter, 252 U.S. 37 36
Simpson v. Jersey City Contracting Co., 165 N.Y. 193 20
South Dakota v. North Carolina, 192 U.S. 286 20

Page.

State Board of Assessors v. Comptoir National d'Escompt, 191 U.S. 388 15, 28
State, ex rel. Rankin, v. Harrington, 68 Mont. 1 19, 30
Stern v. The Queen, [1896] 1 Q.B. 211 19
Swiss Oil Corp. v. Shanks, 273 U.S. 407 36
Tyler v. Dane County, 289 Fed. 843 21
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 34
Union Tank Line Co. v. Wright, 249 U.S. 275 15
United States Express Co. v. Minnesota, 223 U.S. 335 17
United States Glue Co. v. Oak Creek, 247 U.S. 321 14
Western Union Telegraph Co. v. The Attorney General of Massachusetts, 125 U.S. 530 14
Wheeler v. New York, 233 U.S. 434 23, 30
Whiting, Matter of, 150 N.Y. 27 19, 20
Winans v. The King, [1908] 1 K.B. 1022; aff'd in [1910] A.C. 27, sub nom. Winans v. Attorney General 19
Wright v. Louisville & Nashville R.R. Co., 236 U.S. 687 16
W. & J. Sloane v. Commonwealth, 253 Mass. 529 14
Yazoo & Miss. Valley R.R. Co. v. Clarksdale, 257 U.S. 10 20

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General Laws (1921), c. 63 10, 13
General Laws (1921, c. 63, sec. 30 3, 7, 8, 10, 12, 36, 37
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General Laws (1921), c. 63, sec. 44 3, 6, 10, 11
General Laws (1921), c. 63, sec. 77 8
General Laws (1921), c. 155, secs. 24-44 (Uniform Stock Transfer Law) 21

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In the
Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 205.

NATIONAL LEATHER COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, SITTING WITHIN AND FOR THE COUNTY OF SUFFOLK.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT IN ERROR.

REFERENCE TO OPINION BELOW.

The opinion of the full court of the Supreme Judicial Court of Massachusetts below is reported in 256 Massachusetts Reports, 419, and is quoted in full in the record (R. 17).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED BY THE PLAINTIFF IN ERROR.

(1) Final judgment after rescript was entered by the Supreme Judicial Court for Suffolk County on November 29, 1926 (R. 16).

(2) The specific claims advanced and rulings made in the lower court, together with the statutory provisions pertinent, because of and under which the jurisdiction of this court is invoked, are set out in the brief of the plaintiff in error. We do not understand that the rules of this Honorable Court require the defendant in error to repeat in his brief the contentions of the plaintiff in error as to those matters.

STATEMENT OF THE CASE.

These are two petitions brought by the National Leather Company (plaintiff in error in this court) in the Supreme Judicial Court for Suffolk County, Massachusetts, to obtain abatement of certain excise taxes alleged to have been assessed upon it illegally (R. 4, 8). The plaintiff in error is a corporation organized under the laws of the State of Maine (R. 12). It is engaged in the business of purchasing hides and skins, having them tanned by other companies, and selling the leather through the tanners (R. 12). The business of the company during the years involved in these cases was conducted entirely in Massachusetts (R. 12), where the company was qualified to do business (R. 4, 8); its business offices were located solely in Massachusetts; and it carried on no active business outside of Massachusetts, though at all times about two-thirds of the hides and leather belonging to the plaintiff in error have been located outside Massachusetts (R. 12). The plaintiff in error owns (except for qualifying shares) all the stock of two subsidiary companies, National Calfskin Company and A.

C. Lawrence Leather Company, both of which subsidiaries are also corporations organized under the laws of the State of Maine (R. 13). A. C. Lawrence Leather Company is engaged in tanning hides for upper leather on shoes and in selling such tanned leather on a commission basis, most but not all of its business being done for National Leather Company, plaintiff in error here (R. 13). A. C. Lawrence Leather Company maintained tanneries at Peabody, Massachusetts, during the period involved in this case, and was qualified to do business and did business in Massachusetts continuously during that time, as well as in five other States (not including the State of its incorporation), in which States it maintained selling offices (R. 13). National Calfskin Company was engaged during the period involved in this case in purchasing hides, which it tanned at its plant in Peabody, Massachusetts, later selling the finished product through A. C. Lawrence Leather Company (R. 14). During the period in question here National Calfskin Company did business continuously in Massachusetts, which was the only State other than Maine, the State of its incorporation, in which it was qualified to do business; and it had during that period no property or selling branches outside of Massachusetts (R. 14). The certificates of stock in both National Calfskin Company and A. C. Lawrence Leather Company owned by the plaintiff in error here (National Leather Company) were actually held within Massachusetts during the whole period here involved (R. 13, 14). The pertinent statutory provisions (under which the taxes here in dispute were imposed) are contained in General Laws (1921, c. 63, §§ 30, 31, 39, and 44. The portions of the sections involved in this case are printed at this point:

> "Section 30. When used in this section and sections thirty-one to fifty-two, inclusive, the following terms shall have the following meanings:
>
> • • • • • • • • • •

"4. 'Corporate excess employed within the commonwealth' by a foreign corporation, such proportion of the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following:

"(a) Works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee;

"(b) Securities held in the commonwealth, the income of which, if any, if received by a natural person resident therein, would not be liable to taxation, except shares in national banks, voluntary associations, trusts and partnerships. In determining the proportion of assets employed within the commonwealth, the commissioner may include such bank deposits in other states as are employed principally in the conduct of the business in the commonwealth.

* * * * * * * * *

"SECTION 31. In determining the corporate excess of a domestic business corporation, or the corporate excess employed within the commonwealth by a foreign corporation, there shall not be deducted the value of shares in national banks and in voluntary associations, trusts and partnerships, nor of other securities the income of which, if owned by a natural person resident in this commonwealth, would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it or for its benefit; and the commissioner, in determining for the purposes of taxation the value of

the corporate excess of, or corporate excess employed within the commonwealth by, any such corporation, shall not take into consideration any debts of the corporation unless he is satisfied that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it, and, in the case of a domestic business corporation which is a subsidiary of a foreign corporation or closely affiliated therewith by stock ownership, that such debts represent only the fair value of the property given therefor.

* * * * * * * * * *

"SECTION 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth.

"If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the tax shall be assessed to all said corpo-

rations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income, and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the 'net income' under this chapter.

* * * * * * * * *

"SECTION 44. The Commissioner shall determine, from the returns required by this chapter and from any other available information, the net income derived from business carried on within the commonwealth and the corporate excess of every domestic business corporation, and the net income derived from business carried on within the commonwealth of, and the corporate excess employed within the commonwealth by, every foreign corporation, and shall assess thereon the tax provided for in this chapter. Except as otherwise provided in this chapter, the part of said tax which is based upon the value of the corporate excess, or corporate excess employed within the commonwealth, shall be assessed and collected in the same manner and with the same powers as provided in this chapter for the taxation of corporate franchises, and

shall be subject to the other administrative provisions thereof. He shall not determine the income of any such corporation, which has filed a return within the time prescribed by law, to be in excess of the income shown by such return, without notifying the corporation and giving it an opportunity to explain the apparent incorrectness of the return. For the purpose of verifying any such return, the commissioner may, within two years after September first of the year in which such return was due, examine personally or by deputy or agent the books and papers of the corporation, which shall be open to such officer for verification."

The Massachusetts corporation excise, in so far as it is based on the corporate excess of the foreign corporation to be taxed, imposes a tax at the rate of five dollars per thousand on the corporate excess employed by the corporation within Massachusetts [GENERAL LAWS (1921), c. 63, §39, printed at p. 5 of this brief, *supra*]. By section 30, clause 4, of chapter 63 (see this brief, *supra*, p. 4) the corporate excess employed within Massachusetts is defined as being that proportion of the fair cash value of the shares on April 1st of the tax year as the value of the assets of any sort employed in business within the Commonwealth on that date bears to the total value of the corporation's assets wherever situated.

The Commissioner of Corporations and Taxation in determining under GENERAL LAWS (1921), c. 63, §39, the portion of the excise tax upon the National Leather Company (plaintiff in error here) for the years 1922 and 1923, which is based on the value of the corporate excess employed by the company within the Commonwealth of Massachusetts, included the whole of the capital stock of A. C. Lawrence Leather Company and National Calfskin Company owned by the plaintiff in error as assets employed by the plain-

tiff in error in business within Massachusetts for the purpose of apportioning to Massachusetts under GENERAL LAWS (1921), c. 63, §30, cl. 4, the proportion of the fair value of all the shares constituting the capital stock of the company (R. 14, 15). The Commissioner did not include any of the stock owned by the plaintiff in error of other corporations not engaged in business in Massachusetts (R. 14, 15). The question in this case is whether the Commissioner properly included the shares of the subsidiary corporations above mentioned in that part of the proportion described in section 30, clause 4, of GENERAL LAWS (1921), c. 63, which represents assets employed in business in Massachusetts.

The plaintiff in error paid the taxes assessed under protest (R. 15), and brought two petitions under the provisions of GENERAL LAWS (1921), c. 63, §77,* to obtain abatement of the portion of the excises assessed because of the inclusion of the shares of stock (owned by the plaintiff in error) in National Calfskin Company and A. C. Lawrence Leather Company as assets employed by the plaintiff in error in Massachusetts (R. 4, 8), alleging that by the inclusion of the said shares the plaintiff in error was taxed with respect to property not within the jurisdiction of Massachusetts and thereby deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The two petitions (one based upon the tax for 1922 and one upon the tax for 1923) were consolidated (R. 7, 12) by order of the single justice

* "SECTION 77. Any corporation, company or association aggrieved by the exaction of any tax or excise or of any part thereof may, within six months after the payment of the same, whether such payment be after or before the issue of the warrant mentioned in section seventy-two, apply by petition to the supreme judicial court, setting forth the amount of the tax or excise and costs thereon so paid, the general legal grounds and the specific grounds in fact, if any, upon which it is claimed such tax or excise should not have been exacted. Said petition shall be the exclusive remedy and shall be entered and heard in Suffolk county. A copy of the same shall be served upon the state treasurer and upon the attorney general. The proceedings upon such petition shall conform, as nearly as may be, to proceedings in equity, and an abatement shall be made of only such portion of the tax or excise as was assessed *without authority of law*" (italics ours).

of the Supreme Judicial Court of Massachusetts, and the cases were together reserved by the single justice (R. 3) upon the pleadings (R. 4-11) and upon the agreed statement of facts (R. 12-15) for the determination of the full court of the Supreme Judicial Court of Massachusetts, which ordered that the complaints be dismissed (R. 16), the order being accompanied by an opinion officially reported in 256 Massachusetts Reports, 419, *sub nom. National Leather Co.* v. *Commonwealth.* Final decrees dismissing the petitions were entered in accordance with the rescripts (R. 16) and the opinion of the full court (R. 17), whereupon the plaintiff in error petitioned (R. 21) for this writ of error (R. 1) seeking a determination by this Honorable Court of the Federal question raised by the petitions, viz., whether upon the facts shown in the record the plaintiff in error was deprived of its property without due process of law by the inclusion of the shares of stock in the subsidiary corporations owned by the plaintiff in error in computing the corporate excess employed in Massachusetts for the purpose of providing a portion of the *measure* of the corporation *excise* imposed upon the plaintiff in error for the years in question.

SUMMARY OF ARGUMENT.

I. The Commissioner of Corporations and Taxation has determined as a matter of fact that the shares of stock in the subsidiary corporations were assets of the plaintiff in error actually employed in business in Massachusetts. His finding should not be upset unless plainly wrong *as a matter of fact* or unless *as a matter of law* shares of stock are assets incapable of being employed in business outside the State of the domicil either of the corporation owning or of that issuing the shares.

A. The statute requires the Commissioner to determine what assets are employed in business within Massachusetts.

B. The Supreme Judicial Court of Massachusetts has found as a matter of law that the provisions of GENERAL LAWS, c. 63, §§ 30, 31, 39, and 44, are broad enough to include shares of foreign subsidiaries as assets of a foreign corporation employed in Massachusetts, and that the Commissioner was warranted in including the stocks owned by the plaintiff in error as assets employed in Massachusetts.

II. It is within the power of a State to levy an excise tax upon a foreign corporation for the privilege of doing intrastate business within the State including as part of the measure of the tax intangible assets employed in business within the State by the taxpayer corporation. Such intangible assets may properly include shares of stock, belonging to the taxpayer, in foreign subsidiary corporations (if such shares are employed as capital of the taxpayer within the State) without in any way depriving the taxpayer corporation of its property without due process of law.

A. The Massachusetts corporation tax, contained in GENERAL LAWS (1921), c. 63, is an excise tax measured in part by corporate excess.

B. Shares of stock may be used or employed by the owner of such shares in a State other than that of his domicil or that of the incorporation of the company issuing the shares.

1. Shares of stock may be used in a place where they are subject to control. They may be subject to control outside the State of their technical *situs*.

2. In a business sense, certificates of stock represent capital; they have an intrinsic value commensurate with the value of the shares which they represent—and thus may become the basis upon which the owner of the shares is enabled to obtain credit at the place where the certificates are found.

3. The ownership of shares in subsidiaries may well be for the purpose of exercising control of certain processes essential to the conduct of business within the taxing State by the parent company.
4. Like other intangibles, shares of stock may acquire a "business *situs*" outside the domicil either of the stockholder or of the corporation issuing the shares.

III. The facts presented by the record show clearly that the Commissioner of Corporations and Taxation was warranted in finding that the shares in the subsidiary companies were employed in business within Massachusetts during the years in question.

POINTS AND AUTHORITIES.

I.

THE COMMISSIONER OF CORPORATIONS AND TAXATION HAS DETERMINED AS A MATTER OF FACT THAT THE SHARES OF STOCK IN THE SUBSIDIARY CORPORATIONS WERE ASSETS OF THE PLAINTIFF IN ERROR ACTUALLY EMPLOYED IN BUSINESS IN MASSACHUSETTS. HIS FINDING SHOULD NOT BE UPSET UNLESS PLAINLY WRONG AS A MATTER OF FACT OR UNLESS AS A MATTER OF LAW SHARES OF STOCK ARE ASSETS INCAPABLE OF BEING EMPLOYED IN BUSINESS OUTSIDE THE STATE OF THE DOMICIL EITHER OF THE CORPORATION OWNING OR OF THAT ISSUING THE SHARES.

A. The Statute Requires the Commissioner to Determine What Assets are Employed in Business Within Massachusetts.

Section 44 of GENERAL LAWS (1921), c. 63, imposes upon the Commissioner the duty of determining "the corporate excess employed within the Commonwealth by every foreign corporation" (see this brief, *supra*, p. 6). By including the stocks of the foreign subsidiary corporations owned by the plaintiff in error in computing its corporate

excess employed within Massachusetts, the Commissioner has in substance found that these stocks were in fact employed within Massachusetts (see Agreed Statement of Facts, R. 15).

B. The Supreme Judicial Court of Massachusetts has Found as a Matter of Law that the Provisions of General Laws, c. 63, §§ 30, 31, 39, and 44, are Broad enough to Include Shares of Foreign Subsidiaries as Assets of a Foreign Corporation Employed in Massachusetts, and that the Commissioner was Warranted in Including the Stocks Owned by the Plaintiff in Error as Assets Employed in Massachusetts.

The Supreme Judicial Court of Massachusetts has found that there was warrant in fact for the Commissioner's finding that the shares of stock of the subsidiary corporations were employed in Massachusetts (see opinion; R. 19), and that there was no error in law in so finding, inasmuch as that court construes section 30, clause 4, of G.L. c. 63 (quoted in this brief, p. 4) as broad enough to sustain the inclusion of shares of stock of a foreign corporation as assets employed in Massachusetts by another foreign corporation if those shares are found by the Commissioner so to be employed. The question before this court is one merely of the constitutionality of the excise *measure* provided by General Laws, c. 63, §30, cl. 4, as construed by the Supreme Judicial Court as applied to the plaintiff in error. The construction of the statute as including property such as the shares in question within the measure of the excise imposed is a question of state law, which we assume this court will not review. The effect of the statute in practical operation is open to review, and the determination of whether or not it operates in substance to tax property beyond the jurisdiction of Massachusetts raises a constitutional question which may be reviewed here. See *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292, at p. 294.

Two questions of law are thus presented:

1. Is it within the power of a State, in view of the due process clause of the Fourteenth Amendment, to include within the measure of a corporation excise of a foreign corporation shares of stock owned by it in subsidiary foreign corporations, which shares the taxpayer corporation uses within the limits of the State imposing the tax?

2. Does the record present facts sufficient to show that the Commissioner of Corporations and Taxation was wrong as a matter of law in finding that the shares in the subsidiary companies were assets employed in business in Massachusetts?

II.

IT IS WITHIN THE POWER OF A STATE TO LEVY AN EXCISE TAX UPON A FOREIGN CORPORATION FOR THE PRIVILEGE OF DOING INTRASTATE BUSINESS WITHIN THE STATE INCLUDING AS PART OF THE MEASURE OF THE TAX INTANGIBLE ASSETS EMPLOYED IN BUSINESS WITHIN THE STATE BY THE TAXPAYER CORPORATION. SUCH INTANGIBLE ASSETS MAY PROPERLY INCLUDE SHARES OF STOCK, BELONGING TO THE TAXPAYER, IN FOREIGN SUBSIDIARY CORPORATIONS (IF SUCH SHARES ARE EMPLOYED AS CAPITAL OF THE TAXPAYER WITHIN THE STATE) WITHOUT IN ANY WAY DEPRIVING THE TAXPAYER CORPORATION OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

A. The Massachusetts Corporation Tax, Contained in General Laws (1921), c. 63, is an Excise Tax Measured in Part by Corporate Excess.

It is well settled that the Massachusetts corporation tax imposed by the provisions of GENERAL LAWS (1921), c. 63 (the pertinent sections of which have been quoted, *supra*, pp. 3-7), is an excise, which, as applied to foreign corporations, is for the privilege of doing intrastate business within Massachusetts.

Judson Freight Forwarding Co. v. *Commonwealth,* 242 Mass. 47.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U.S. 203, 216.

W. & J. Sloane v. *Commonwealth,* 253 Mass. 529.

Such an excise on the privilege of doing purely intrastate business may properly be measured by the portion of the value of the capital stock represented by assets employed within the State by the corporation to be taxed.

United States Glue Co. v. *Oak Creek,* 247 U.S. 321.

Hump Hairpin Manufacturing Co. v. *Emmerson, Sec'y of State of Illinois,* 258 U.S. 290, 295.

American Mfg. Co. v. *St. Louis,* 8 Fed. (2d Series) 447, 450 (C.C.A. 8th Circ.).

Judson Freight Forwarding Co. v. *Commonwealth, supra,* at pp. 52-53.

It is well established by the decisions of this Honorable Court that property, intangible as well as tangible, is subject to taxation wherever it is commonly used and employed, despite fictions with respect to *situs.* Both direct taxes upon property and excise taxes upon a privilege measured by property used within the taxing State have been sustained on this basis.

Western Union Telegraph Co. v. *The Attorney General of Massachusetts,* 125 U.S. 530.

Pullman's Palace Car Co. v. *Pennsylvania,* 141 U.S. 18.

Postal Telegraph Cable Co. v. *Adams,* 155 U.S. 688.

Adams Express Co. v. *Ohio State Auditor,* 166 U.S. 185.

American Refrigerator Transit Co. v. *Hall,* 174 U.S. 70.

New Orleans v. *Stempel*, 175 U.S. 309.
Bristol v. *Washington County*, 177 U.S. 133.
State Board of Assessors v. *Comptoir National d'Escompte*, 191 U.S. 388.
Scottish etc. Insurance Co. v. *Bowland*, 196 U.S. 611.
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U.S. 395.
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Cudahy Packing Co. v. *Minnesota*, 246 U.S. 450.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.
DeGanay v. *Lederer*, 250 U.S. 376.
Pullman Co. v. *Richardson*, 261 U.S. 330, 338.
Air Way Electric Appliance Corp. v. *Day*, 266 U.S. 71, 81.
Bass, Ratcliff & Gretton, Ltd., v. *State Tax Commission*, 266 U.S. 271.

B. Shares of Stock may be Used or Employed by the Owner of Such Shares in a State Other than that of his Domicil or that of the Incorporation of the Company Issuing the Shares.

It is the contention of the defendant in error that shares of stock in foreign subsidiary corporations may be capital of a foreign corporation employed within Massachusetts if such shares can be shown to be localized there by the way in which the owner of the shares makes use of the property interest represented by the shares or because they have been acquired and employed as an integral part of the business conducted by the parent company within Massachusetts. It is familiar law that for purposes of direct taxation of the property interest in the shares the primary *situs* of corporate stock is at the domicil of the stockholder.

Hawley v. *Malden*, 232 U.S. 1.

Bellows Falls Power Co. v. *Commonwealth*, 222 Mass. 51.
Wright v. *Louisville & Nashville R.R. Co.*, 236 U.S. 687.

It is, however, equally familiar law that the maxim *mobilia sequuntur personam* will yield to the actual situation of intangible assets in a State other than the domicil of the owner, especially for purposes of taxation.

Metropolitan Life Ins. Co. v. *New Orleans*, 205 U.S. 395, 402, *supra.*
Blackstone v. *Miller*, 188 U.S. 189, 204.
Scottish etc. Ins. Co. v. *Bowland*, 196 U.S. 611, *supra.*

The domicil of a corporation is unquestionably the State of its incorporation, and that State remains its domicil despite the fact that the corporation may do business in other States.

Bank of Augusta v. *Earle*, 13 Pet. 519, 588.
Insurance Co. v. *Francis*, 11 Wall. 210.
See *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U.S. 69, 84.

In the case at bar, therefore, it seems that the plaintiff in error, National Leather Company, could have been taxed in Maine with respect to the shares owned by it of the subsidiary companies, National Calfskin Company and A. C. Lawrence Leather Company. The question involved in the present case is not the limited one of the power of Massachusetts to impose a direct tax on the National Leather Company, the plaintiff in error, with respect to its shares of stock in the subsidiaries; but rather the issue involves the determination of a far broader question than that of mere taxable *situs* for purposes of direct taxation, viz., the question whether these shares are capital or property of

the plaintiff in error which could be *used* in any way by the plaintiff in error in connection with its intrastate or local business in Massachusetts, so that the use could be fairly said to be a part of the Massachusetts business, attributable to the privilege of doing local business in Massachusetts. The defendant in error, the Commonwealth of Massachusetts, does not in any way admit that it is beyond the power of the Commonwealth upon the state of facts presented in this case to impose a direct tax upon the property interest of the plaintiff in error in these very shares. On the contrary, the Commonwealth contends not only that the certificates are taxable because kept in Massachusetts, but that the shares have acquired a *business situs* in Massachusetts which would give Massachusetts power to tax the shares directly; and we submit that the existence of a *business situs* of the shares in Massachusetts (which is discussed in this brief, *infra*, p. 26) is highly persuasive upon the question of whether Massachusetts has power to *measure* a corporation *excise* by the shares. If Massachusetts has power to tax the shares directly, the Commonwealth may use the shares as the measure of an excise imposed for a privilege which the Commonwealth itself confers; but, even if the shares have no *business situs* in Massachusetts, and even if they could not be taxed directly, the corporation *excise* tax of the plaintiff in error may be measured by the shares if they represent capital employed in business in Massachusetts. It is fundamental that an excise tax may be measured by property which cannot be taxed directly, if the burden thereby imposed upon the non-taxable property is not direct, proximate, and immediate.

Flint v. *Stone Tracy Co.*, 220 U.S. 107, 165.

United States Express Co. v. *Minnesota*, 223 U.S. 335, 344.

Kansas City etc. Ry. v. *Botkin*, 240 U.S. 227, 232.

Greiner v. *Lewellyn*, 258 U.S. 384, 387.
Cf. *Northwestern Mut. Life Ins. Co.* v. *Wisconsin*, U.S. Supreme Court, Oct. term, 1927, Nos. 75, 76, dec. Nov. 21, 1927—

where the burden imposed by the Wisconsin tax there in question upon United States bonds was held to be too direct.

It is therefore unnecessary to decide in this case whether the shares here involved had a *business situs* in Massachusetts or whether Massachusetts could have taxed the shares directly. The Commonwealth will have upheld successfully the validity of the corporation tax statute if it shows (1) that it is possible for a foreign corporation to use shares of stock in foreign subsidiaries outside the State of its own incorporation; (2) that the Commissioner was not plainly wrong in finding that these particular shares were used in Massachusetts by the plaintiff in error. The defendant in error therefore submits that it is possible for a corporation to use such shares outside of the State of its own incorporation.

1. Shares of Stock may be Used in a Place where they are Subject to Control. They may be Subject to Control Outside the State of their Technical Situs.

The certificates representing shares of stock have unquestionably come to have many of the legally recognized incidents and attributes of tangible personal property.

DeGanay v. *Lederer*, 250 U.S. 376, 381; see s.c. below, 239 Fed. 568, 572, 574, *supra*.
Cummings v. *Clark*, 282 Fed. 300, 305.
Beale, Foreign Corporations, pp. 483-485.
1 Williston, Contracts, pp. 835-837.

The stock certificate in the eyes of the business community certainly represents the shareholder's interest in

the company, and control of the certificate in many instances involves control of the shareholder's interest.

See, *e.g., Disconto Gesellschaft* v. *U.S. Steel Corporation,* 267 U.S. 22. (A careful analysis is contained in the brief of the appellee in that case, at pp. 16-79.)

A certificate of stock of a foreign corporation constitutes property within the jurisdiction where the certificate is found.

DeGanay v. *Lederer,* 250 U.S. 376, 381, *supra.*

State, ex rel. Rankin, v. *Harrington,* 68 Mont. 1 (taxation of shares).

Re Aschrott, [1927] 1 Ch. 313.

Stern v. *The Queen,* [1896] 1 Q.B. 211 (for the purposes of succession).

See *Winans* v. *The King,* [1908] 1 K.B. 1022; aff'd in [1910] A.C. 27, *sub nom. Winans* v. *Attorney General.*

Cf. *Scottish etc. Insurance Co.* v. *Bowland,* 196 U.S. 611, *supra.*

See *New York, ex rel. Hatch,* v. *Reardon,* 204 U.S. 152, 158, upholding the validity of a New York stamp transfer tax upon certificates of stock in foreign corporations owned by non-residents of New York.

Matter of Whiting, 150 N.Y. 27.

Compare, however, *Matter of Gates,* 243 N.Y. 193, where the distinction between the property in the certificate and that in the corporation was not mentioned.

See *Goodrich,* "Problems of Foreign Administration," 39 HARVARD LAW REVIEW, 797, 805.

3 SCHOULER, WILLS (6th ed.), pp. 1728-1729.

Stock certificates are subject to garnishment, attachment, or sale on execution where they are found.

Puget Sound National Bank v. *Mather,* 60 Minn. 362.

Simpson v. *The Jersey City Contracting Co.*, 165 N.Y. 193.

Griswold v. *Kelly-Springfield Tire Co.*, 94 N.J. Eq. 308.

South Dakota v. *North Carolina*, 192 U.S. 286, 321.

See *Yazoo & Miss. Valley R.R. Co.* v. *Clarksdale*, 257 U.S. 10, 21.

Disconto Gesellschaft v. *U.S. Steel Corp'n*, 267 U.S. 22, *supra*.

People, ex rel. Wynn, v. *Grifenhagen*, 167 App. Div. (N.Y.) 572, 576.

2 Cook, Corporations (8th ed.), p. 1608.

Stock certificates may be converted or may become the subject of larceny.

Neiler v. *Kelley*, 69 Pa. St. 403.

See *Matter of Whiting*, 150 N.Y. 27, 30, *supra*.

Bellows Falls Power Co. v. *Commonwealth*, 222 Mass. 51, 58, *supra*; writ of error dismissed, 245 U.S. 630 (for want of jurisdiction).

See Sedgwick, Damages (9th ed.), p. 521.

Stock certificates are considered property for the purpose of conferring jurisdiction upon courts.

Chase v. *Wetzlar*, 225 U.S. 79, 88.

Blake v. *Foreman Bros. Banking Co.*, 218 Fed. 264.

Beal v. *Carpenter* (C.C.A. 8th Circ.), 235 Fed. 273.

Merritt v. *American Steel-Barge Co.* (C.C.A. 8th Circ.), 79 Fed. 228, 234.

Norrie v. *Lohman* (C.C.A. 2d Circ.), 16 Fed. (2d Series) 355, 358; s.c. with comment 26 Michigan Law Review, 101 (Nov. 1927).

Franz v. *Buder* (C.C.A. 8th Circ.), 11 Fed. (2d Series) 854, 856, 859.
Lockwood v. *U.S. Steel Corporation,* 209 N.Y. 375.
Re Clark, [1904] 1 Ch. 294.
Cf. *Iowa* v. *Slimmer,* 248 U.S. 115, 120.

The UNIFORM STOCK TRANSFER LAW, which is in effect in Massachusetts [GENERAL LAWS, (1921), c. 155, §§ 24-44], also adopts the principle that the certificate represents the shares of stock and constitutes a controlling factor without which the shareholder's property interest in the corporation cannot be transferred.

See *Klein* v. *Wilson & Co., Inc.,* 7 Fed. (2d Series) 769.
Tyler v. *Dane County,* 289 Fed. 843, 851.
Newell v. *Tremont Lumber Co.,* 161 La. 649.
Cf. *Lockhart* v. *Dickey,* 161 La. 282, 287.
See 2 COOK, CORPORATIONS (8th ed.), pp. 1437 *et seq.*
Note, 38 HARVARD LAW REVIEW, 809, 814.
Note, 36 YALE LAW JOURNAL, 694, 698.

No contention is made here that the UNIFORM STOCK TRANSFER LAW is controlling. The theory of that act is cited merely by way of helpful analogy as lending weight to the legislatively recognized concept of a stock certificate as tangible property having value commensurate with the share behind it.

The extent to which the certificate represents the share of stock and, therefore, the property interest of the shareholder is sufficiently brought out by the citations above. In the case at bar it is undisputed that the certificates of stock in the subsidiary companies were actually kept in Massachusetts by National Leather Company, the plaintiff in error. To Massachusetts, then, and to the privilege of doing Massachusetts business, was attributable a large measure of control over the capital repre-

sented by the shares, and the property interest in the shares from certain aspects was afforded protection by Massachusetts laws. It is submitted that the possession of the certificates in Massachusetts, the existence of the control of the property based upon the certificates, and the capability of the use of the stock for corporate purposes within Massachusetts constituted in a very real sense an employment by National Leather Company of the capital represented by the stock at the place where the certificates were.

2. In a Business Sense, Certificates of Stock Represent Capital; they have an Intrinsic Value Commensurate with the Value of the Shares which they Represent—and thus may Become the Basis upon which the Owner of the Shares is Enabled to Obtain Credit at the Place where the Certificates are Found.

In the section of this brief (pp. 18-22) next preceding, various aspects of certificates of stock which give them value have been discussed. It is a matter of common knowledge that certificates of stock are used as security for the purpose of obtaining credit.

See *Blake* v. *Foreman Bros. Banking Co.*, 218 Fed. 264, *supra*.
Bellows Falls Power Co. v. *Commonwealth*, 222 Mass. 51, 58, *supra*.
2 WILLISTON, CONTRACTS, pp. 1957-1958.
2 COOK, CORPORATIONS (8th ed.), p. 1437.

Whether used for the purpose of a pledge or not, the possession within the State of stock certificates by a corporation could readily give the corporation a very definite additional strength in obtaining credit. Commonly the ownership of the shares is a matter which appears in the published balance sheets of a company, thereby affecting favorably the general financial standing of the company.

Where, as in the case at bar, a corporation does business only in one State, the favorable effect upon the credit facilities of the company can be felt only in that State, and in that State alone is the value of the privilege of doing business thereby increased. To the extent also that certificates of stock are property subject to garnishment, attachment, and sale on execution (see this brief, *supra*, p. 19), the shares are in the State where the securities are kept thus readily available to satisfy the claims of creditors.

Cf. *Scottish etc. Ins. Co.* v. *Bowland*, 196 U.S. 611, *supra*.

It is also an ordinary business principle that certain financial reserves are essential to the safe and proper conduct of any business enterprise. Securities, in substance the equivalent of cash, may well form such a reserve, which, because a necessary part of a business, is clearly capital employed in the business, though perhaps not as actively employed as capital used, *e.g.*, for manufacturing purposes or for the purchase of stock in trade. Where the only business of a corporation is transacted in one State, as in the case of the business of the plaintiff in error, the capital represented by a proper business reserve can be employed only in that State, which employment is properly attributable to the privilege of doing such business.

That this court will be slow to hold unconstitutional a state taxing statute which takes into account the ordinary habits, customs, and practices of business men seems abundantly clear. In *Wheeler* v. *New York*, 233 U.S. 434, this court held valid a New York succession tax which, as construed by the state court, treated as taxable a note by a non-resident maker kept in New York by a non-resident payee at the time of the latter's death. It was obvious that the state tax statute there involved intended that intangibles represented by a tangible paper which in a

business sense incorporated the obligation should be considered to have a *situs* for tax purposes in New York. This court, through Mr. Justice Holmes, spoke as follows, at pp. 438-439:

> "But we are bound by the construction given to the New York statutes by the New York courts, and the question is whether a statute that we must read as purporting to give to bills and notes within the State the same standing as bonds for purposes of taxation, goes beyond the constitutional power of the State. Again for the purposes of argument we may assume that there are limits to this kind of power; that the presence of a deed would not warrant a tax measured by the value of the real estate that it had conveyed, or even that a memorandum of a contract required by the statute of frauds would not support a tax on the value of the contract because it happened to be found in the testator's New York strong box. But it is plain that bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An indorsement of the paper carries the contract to the endorsee. An indorsement in blank passes the debt from hand to hand so that whoever has the paper has the debt. It is true that in some cases there may be a recovery without producing and surrendering the paper, but so may there be upon a bond in modern times. It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others. It would be an extraordinary deduction from the Fourteenth Amendment to deny the power of a State to adopt the usages and views of business men

in a statute on the ground that it was depriving them of their property without due process of law. The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434. Unless we are bound by authority, we think the statute, so far as we now are concerned with it, plainly within the power of the State to pass."

3. *The Ownership of Shares in Subsidiaries may Well be for the Purpose of Exercising Control of Certain Processes Essential to the Conduct of Business Within the Taxing State by the Parent Company.*

Where, as in the case at bar, a parent corporation holds a controlling interest in the stock of subsidiary corporations, the purpose of that stockholding may well be the control of some processes essential to the conduct of business by the parent company. For many legitimate and proper reasons, a parent corporation may desire to have certain phases of the manufacturing or the marketing of a given product carried on under the aegis of a separate corporate entity.

> See, *e.g.*, the situation in *Edwards* v. *Chile Copper Co.*, 270 U.S. 452.

The investment of the assets of the parent corporation in the stock of the subsidiary is for that reason none the less an investment in the business of the parent corporation. If the parent corporation is successfully to carry on the business authorized by its charter, it must make use of the processes or activities which it has entrusted to its subsidiaries. By an investment of its own assets in a controlling interest of the stock of another corporation, it makes certain that facilities for the conduct of the processes in question will be available to it on advantageous terms. Such an investment is clearly attributable to the

business of the parent corporation, and if that business is carried on in one State only, it can be attributable to that State only.

We recognize, of course, that, in view of the intervention of the corporate fiction of the subsidiary, the business of the subsidiary cannot be said to be the business of the parent company and the parent company cannot be taxed upon the business as such.

People, ex rel. Studebaker Co. etc., v. *Gilchrist*, 244 N.Y. 114.

Cf. inability of State to impose transfer tax upon the transfer of shares of a corporation based only on the ground that the corporation has property within the State.

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U.S. 69, *supra.*

4. Like Other Intangibles, Shares of Stock may Acquire a "Business Situs" Outside the Domicil either of the Stockholder or of the Corporation Issuing the Shares.

It has already been argued that intangible as well as tangible property is subject to direct taxation in a State where it is used, and that excise taxes on privileges conferred by the taxing State may be measured by property used within the State (see this brief, p. 14, and authorities there cited). The cases dealing with intangibles recognize that the fictitious *situs* of such property at the domicil of its owner cannot exclude a State from taxing such property when it represents capital employed as an essential part of business within the State; particularly when the ownership of the property is attributable solely to the exigencies of that local business.

Cf. *Adams Express Co.* v. *Ohio State Auditor*, 166 U.S. 185; s.c. 165 U.S. 194; and
American Express Company v. *Indiana*, 165 U.S. 255—

in which this court held intangible property of a company was used and was taxable where the business of the company was carried on, with which business the intangible property of the company was inextricably associated.

In *New Orleans* v. *Stempel*, 175 U.S. 309, *supra*, this court held that a non-resident of Louisiana was taxable there with respect to notes secured by mortgages on Louisiana real estate. The notes were kept in Louisiana and the proceeds were from time to time reinvested there, clearly giving this intangible property a *situs* in Louisiana from a business standpoint. The court speaks in the following words, at p. 322:

> "Now if property can have such a situs within the State as to be subject to seizure and sale on execution, it would seem to follow that the State has power to establish a like situs within the State for purposes of taxation. . . .
>
> "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

In *Bristol* v. *Washington County*, 177 U.S. 133, *supra*, the personal property of a non-resident invested in bonds and mortgages within the taxing State was held to be taxable in that State when the capital involved was used in a business within the State.

In *Blackstone* v. *Miller*, 188 U.S. 189, it was held that New York might constitutionally impose a transfer tax upon the succession to credits in the form of bank deposits in a New York bank belonging to a non-resident.

State Board of Assessors v. *Comptoir National d'Escompte*, 191 U.S. 388 (at 402 *et seq.*), is in the line of cases headed by *New Orleans* v. *Stempel*, *supra*, and which includes *Metropolitan Life Insurance Co.* v. *New Orleans*, 205 U.S. 395, *supra*, and *Liverpool & London & Globe Ins. Co.* v. *Orleans Assessors*, 221 U.S. 346, 354, *supra*, all holding constitutional Louisiana statutes which imposed taxes upon credits belonging to non-residents, but arising from business carried on in Louisiana or representing capital employed in Louisiana.

In *Scottish Union etc. Ins. Co.* v. *Bowland*, 196 U.S. 611, *supra*, this court held valid a tax imposed under Ohio laws upon a foreign insurance corporation with respect to certain bonds deposited with a State official as security for Ohio policyholders.

In *DeGanay* v. *Lederer*, 250 U.S. 376, *supra*, this Honorable Court held that corporate stocks and bonds, which were physically kept in the United States and also were in the care of an agent here, belonging to a non-resident alien were property owned in the United States within the meaning of the 1913 Income Tax Act. The court, at p. 381, speaks as follows:

> "To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By state and federal statutes they are often treated as property, not as mere evidences of the interest which they represent. In *Blackstone* v. *Miller*, 188 U.S. 189, 206, this court held that a deposit by a citizen of Illinois in a trust company in the City of New York was subject to the transfer tax of the State of New York and said: 'There

is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds,* 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker,* 177 Massachusetts, 335, 337.'

"The Court of Appeals of New York, recognizing the same principle, treated such instruments as property in *People ex. rel. Jefferson* v. *Smith,* 88 N. Y. 576, 585:

" 'It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a *situs* at the place where they are found like other visible, tangible chattels.'

"We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. It is only necessary to refer to some of the decisions of this court. *New Orleans* v. *Stempel,* 175 U.S. 309;

Bristol v. *Washington County*, 177 U.S. 133; *Blackstone* v. *Miller, supra; State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U.S. 388; *Carstairs* v. *Cochran*, 193 U.S. 10; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U.S. 611; *Wheeler* v. *New York*, 233 U.S. 434, 439; *Iowa* v. *Slimmer*, 248 U.S. 115, 120. Shares of stock in national banks, this court has held, for the purpose of taxation may be separated from the domicile of the owner, and taxed at the place where held. *Tappan* v. *Merchants' National Bank*, 19 Wall. 490."

See also *Belloæs Falls Power Co.* v. *Commonwealth*, 222 Mass. 51, 58, 62, *supra.*

In *State, ex rel. Rankin,* v. *Harrington*, 68 Mont. 1, *supra,* the court, after reviewing the decisions on "business *situs,*" holds that Montana should not under its laws and constitution impose a tax upon stocks of a resident, when the stocks were kept and used in a brokerage business in New York, on the ground that the stocks, because the certificates were in New York and because the stocks were used in business there, had acquired a "business *situs*" outside Montana.

Cf. *Fidelity etc. Trust Co.* v. *Louisville*, 245 U.S. 54, 57-58.

Wheeler v. *New York*, 233 U.S. 434, *supra.*

Iowa v. *Slimmer*, 248 U.S. 115, 120, *supra.*

See *Thomas R. Powell*, "The Business Situs of Credits," 28 West Virginia Law Quarterly, 89.

We submit that the authorities above cited go clearly to the extent of holding that shares of corporate stock may acquire a business *situs* for tax purposes at a place where the shares are used and kept for business purposes. The constitutional requirement that property to be taxable

must be present within the jurisdiction is abundantly satisfied when shares of stock are not only physically within the taxing State, because of the physical presence of the certificate representing the shares, but when also the shares represent the element of control of some process essential to the parent company, the business of which is conducted entirely within the taxing State. If to these elements of presence is added the potentiality of strength in financial position made available by the ownership of these shares in connection with a local business in the taxing State, it can hardly be denied that shares of stock can in fact be employed within a State which is neither the domicil of the corporation issuing the shares nor the domicil of the owner of the shares. Since this is true, to the extent that the shares are employed within the taxing State and to the extent that they are property within the State, they may be used as part of the basis of the measure of an excise imposed upon the corporation owning the shares for the privilege of doing business within the taxing State (see cases cited this brief, *supra*, p. 14). As we have contended above (see this brief, *supra*, p. 17), it is not in this case necessary, in order to sustain the taxes here involved, for Massachusetts to argue nor for this court to decide that the shares of stock in the subsidiary companies could have been taxed by Massachusetts directly as property of National Leather Company. If the property was used in Massachusetts by National Leather Company, it was sufficiently present there to warrant the Commonwealth in measuring by it the value of the privilege of doing business within Massachusetts, to which privilege, we submit, the ownership and use of these shares was directly and entirely attributable.

III.

The Facts Presented by the Record Show Clearly That the Commissioner of Corporations and Taxation was Warranted in Finding that the Shares in the Subsidiary Companies were Employed in Business Within Massachusetts During the Years in Question.

In section II of this brief (pp. 13 to 31) we have endeavored to show that Massachusetts had power to measure a corporation excise imposed upon a foreign corporation by the value of the property employed in business within Massachusetts by that corporation, and that such a foreign corporation could use in Massachusetts business shares of stock in another foreign corporation. Assuming for the moment that Massachusetts has power to include such shares of stock within the scope of property employed in Massachusetts, we now submit that the Commissioner of Corporations and Taxation was clearly warranted in finding that during the years involved in this case the shares of stock of the subsidiaries were employed in Massachusetts by National Leather Company, plaintiff in error here (see this brief, *supra*, p. 11). The Supreme Judicial Court has reviewed that finding and has taken into account all the facts which the taxpayer, National Leather Company, chose to present to that court in support of its petition to recover the taxes paid (see Agreed Statement of Facts, R. 12-15; Opinion of Supr. Jud. Ct., R. 17, esp. at p. 19). It appears that the plaintiff in error does not deny the accuracy of the Commissioner's finding of fact in its "Statement of Points to be Relied Upon" (R. 26), and only inferentially (if at all) in its "Assignment of Errors" (R. 23). It is submitted that under these circumstances in this court the finding of fact by the Commissioner will be treated as final, particularly when that finding has been held to be warranted by the highest court in the State, since there is evidence in the agreed statement of facts to

support it and since it is not a case "where a conclusion of law as to Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question to analyze the facts" in the particular case.

Fiske v. *Kansas,* 274 U.S. 380, 385-386.
Aetna Life Ins. Co. v. *Dunken,* 266 U.S. 389, 394.
Grayson v. *Harris,* 267 U.S. 352, 357.
Cf. *First National Bank of Hartford* v. *Hartford,* 273 U.S. 548, 552.

The Commissioner's finding, however, will withstand careful scrutiny by this court, for the record in this case shows that there was abundant evidence that the shares of the subsidiary company represented capital employed in business in Massachusetts by National Leather Company.

We have cited cases (at pp. 18 to 22 of this brief) showing the importance of the presence of the stock certificate within the taxing State as giving a taxable *situs* to shares of stock within that State. In the case at bar it is undisputed that the stock certificates representing the shares in question were kept in Massachusetts (R. 13, 14). The shares were thus available for the purpose of obtaining credit by a pledge of the certificates in Massachusetts. The very holding of the certificates within Massachusetts was a corporate act in Massachusetts, of which all the business benefit would be gained by business carried on in Massachusetts, since National Leather Company carried on no active business outside Massachusetts (R. 12). To that business alone could the ownership of the shares be attributed if the shares were held for their value in carrying out the corporate purposes, since the credit advantages obtained by the corporation through its ownership of the shares and the value of the shares as a business reserve could give added value only to the privilege of

doing business in Massachusetts. Although shares in subsidiary corporations which did no business in Massachusetts were not treated by the Commissioner as capital employed in Massachusetts, we submit that such shares might have been included to the extent to which he found that they gave value to the privilege of doing business in Massachusetts. The Commissioner's failure to include those shares works to the advantage of the plaintiff in error, however, and it cannot be heard to complain of it.

Roberts & Schaefer Co. v. *Emmerson*, 271 U.S. 50, 55.

Bass etc., Ltd., v. *Tax Commission*, 266 U.S. 271, 283, *supra.*

The fact that the control of these shares gave the plaintiff in error control of processes essential to the Massachusetts business of the corporation was also, we contend, a consideration to which the Commissioner might give some weight. We submit that the words of the Chief Justice of the Massachusetts Supreme Judicial Court in the opinion in this case below are apt: "Without discussing whether any one or more of those factors standing alone would justify the method employed in ascertaining the excise, their collective force is sufficient to that end" (R. 19). We further submit that there is "nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary or that its application to this corporation produced an unreasonable result."

See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 121.

In re Pantlind Hotel Co., 232 Mich. 330, is a recent case in which a state court construing a statute not unlike the Massachusetts statute reaches a conclusion opposed to that at which the Massachusetts court arrived. The de-

cision in that case is not helpful or persuasive here, for the court rests its decision upon the construction of the statute before it, and not on broad constitutional grounds. It is well-settled law that this court will not undertake to adopt a construction of a state statute different from that taken by the highest court of the State in question (see this brief, *supra*, p. 33).

People, ex rel. Edison etc. Co., v. *Campbell*, 138 N.Y. 543, may be distinguished in similar fashion.

One further contention is made by the plaintiff in error in its "Statement of Points to be Relied Upon" (R. 26, point 2) which must be mentioned here. The subsidiaries are themselves taxed for the privilege of doing Massachusetts business under the same statutory provisions. It is urged that to take into account the shares in the subsidiaries in taxing the privilege of National Leather Company must necessarily result in unconstitutional double taxation. It seems clear that two different privileges are taxed thereby: the privilege of the subsidiaries to do Massachusetts business and the privilege of National Leather Company to do Massachusetts business. The fact that National Leather Company owns the shares in the subsidiaries unquestionably gives added value to its privilege of doing business in Massachusetts; but that added value is something distinct and apart from the subsidiaries' privilege, and in no way decreases the value to the subsidiaries of the privilege which they enjoy. Indeed, the shares in the subsidiaries owned by National Leather Company are not themselves taxed directly. They are only taken into account in determining the worth of the privilege which is taxed, to which they are attributable and to which they lend value. Such taxation is not double taxation in any sense objectionable under the Fourteenth Amendment, by which double taxation is not forbidden.

Fort Smith Lumber Co. v. *Arkansas*, 251 U.S. 532.

Cream of Wheat Co. v. *Grand Forks*, 253 U.S. 325.

Swiss Oil Corp. v. *Shanks*, 273 U.S. 407, 409.

See also *Shaffer* v. *Carter*, 252 U.S. 37, 58.

Royal Mineral Ass'n v. *Lord*, 13 Fed. (2d Series) 227, 230.

A passing word is required by the final argument of the plaintiff in error contained in its brief (at pp. 22-25), based upon what it contends was the misconstruction of the Massachusetts statute by the Massachusetts court. At p. 7, *supra*, of this brief we have discussed at length the method provided by the Massachusetts statute for the allocation of the corporate excess of a foreign corporation. We do not dispute the accuracy of the description of that process by the plaintiff in error on page 23 of its brief. We do contend, however, that its suggestion that the Massachusetts court erroneously construed GENERAL LAWS, c. 63, §§ 30 and 31, is unfounded in fact. The court (R. 18) first decides that—

> "The commissioner of corporations and taxation in determining under G.L. c. 63, §44, the 'corporate excess employed within the Commonwealth, by every foreign corporation' doing domestic business here is required to give those words the definition and to follow the legislative mandate in G.L. c. 63, §30, cl. 4, namely, 'such proportion of the fair cash value of all the shares constituting the capital stock . . . [on a specified date] as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of' certain tangible properties not here relevant, and 'Securities held in the Commonwealth, the income of which, if any, if received by a natural person

resident therein, would not be liable to taxation,' with exceptions not now pertinent."

The court then quite properly calls attention to the fact that there shall not (according to the provisions of section 31 of GENERAL LAWS, c. 63) be deducted from the assets *found to be employed in Massachusetts* the value of certain securities, the income of which would be taxable to Massachusetts residents.

The court, as we have pointed out before (*supra*, p. 12), rests its decision firmly on the ground that the assets here in issue, *i.e.*, the stock in the subsidiary corporations, were employed in Massachusetts (R. 19, first whole paragraph). Then follows the passage quoted at p. 24 of the brief of the plaintiff in error, in which the court shows that section 30, clause 3, and section 31 together do not allow the deduction from *assets found to be employed in Massachusetts* of stocks such as those here in issue.

The court, we submit, at all times recognizes that shares of stock, assets of foreign corporations, cannot be included in the corporate excess measure of the excise, unless they be first found to be assets employed by the foreign corporation in Massachusetts. The effect of section 31 (and the court so recognizes) is to forbid the deduction of certain stocks already found to be assets employed in Massachusetts. The plaintiff in error goes far beyond the language of the court or its fair meaning in trying to show that the opinion construes the statute as requiring the inclusion as assets employed in Massachusetts by a foreign corporation of the stock of all other foreign corporations owned by it. That the contention of the plaintiff in error is both unfair and untrue is shown clearly by the fact that the court in no wise intimates that the Commissioner erred in not including the stocks of other foreign subsidiaries (than A. C. Lawrence Company and National Calfskin Company) as assets employed in Massachusetts, the court assuming

apparently that the Commissioner from the evidence before him found that these assets were not employed in Massachusetts. We do not admit, however, if the stocks in other foreign corporations had been employed in Massachusetts, that they could not have been included in the Commissioner's computation of assets so employed. On the contrary, we contend that, if he had found that the stocks owned by National Leather Company in corporations not engaged in business in Massachusetts were in fact assets of National Leather Company employed in Massachusetts, it would have been his duty to include those stocks in his computation.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1927.

National Leather Company, Plaintiff in Error, *vs.* Commonwealth of Massachusetts.	In Error to the Supreme Judicial Court of the State of Massachusetts.

[May 28, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

The National Leather Co., a Maine corporation, applied by two petitions to the Supreme Judicial Court of Massachusetts for Suffolk County,[1] for the abatement of portions of the taxes that had been exacted of it by the commissioner of corporations and taxation, under Chapter 63 of the General Laws, for the privilege of carrying on business in Massachusetts in the years 1922 and 1923. The petitions alleged that the statute as applied was an attempt to tax property not within the jurisdiction of Massachusetts and repugnant to the Fourteenth Amendment. The cases were consolidated, and at the hearing, by order of the presiding justice, were reserved for determination by the full court upon the pleadings and an agreed statement of facts. The court in banc sustained the excise, 256 Mass. 419; and in accordance with its rescript the court for Suffolk County dismissed the petitions. The writ of error was properly directed to the latter court. See *Davis* v. *Cohen Co.*, 268 U. S. 638, 639.

The statute provides that every foreign corporation shall pay annually "with respect to the carrying on or doing of business by it within the commonwealth," an excise consisting in part of an amount "equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth," which is defined as "such proportion of the fair cash value of all the shares constituting the capital stock . . as the value of the assets, both real and personal, employed in any business within the

[1]These proceedings were instituted under G. L. c. 63, § 77.

Commonwealth . . bears to the value of the total assets of the corporation," with certain exceptions not here material. § 30, cl. 4; § 39(1).

The business of the National Leather Co.—hereinafter called the petitioner—was the purchasing of hides and skins, having them tanned by other companies, and selling the leather through the tanners. It operated no tanneries itself. Its business was conducted wholly in Massachusetts; its business offices were located there; and it carried on no active business outside the State. Among other properties it owned the entire capital stock, except a few qualifying shares, of the A. C. Lawrence Leather Co. and the National Calfskin Co., two other Maine corporations. Its upper leather was tanned chiefly by these two subsidiary corporations; and its sole leather by other corporations in which it had no interest.

The business of the Lawrence Company was the tanning of hides, principally for upper leather, which it sold on a commission basis. Most of its tanning was done for the petitioner. Its tanneries were in Massachusetts, where it was engaged in business, but it was qualified to do business and had selling branches in four or five other States. The business of the Calfskin Company was tanning hides of the petitioner. Its tannery was in Massachusetts, where it was engaged in business. It had no property or selling branches outside Massachusetts, and was not qualified to do business in any other State except Maine.

In determining the portions of the excises based upon "corporate excess" the commissioner included all the capital stock of the Lawrence Company and the Calfskin Company owned by the petitioner, as part of the assets employed by it in business within Massachusetts; but did not include any stocks owned by it in other corporations which were not engaged in business within Massachusetts.

The petitions for abatement were directed solely to the portions of the excises assessed by reason of this inclusion of the capital stocks of the Lawrence and Calfskin Companies.

The petitioner contends that the inclusion of these stocks as part of the assets employed by it in business in Massachusetts for the purpose of measuring its taxable corporate excess is in effect the imposition of a tax upon the stocks themselves; that these stocks, as distinguished from the assets of the subsidiary corporations, had no situs in Massachusetts and were not within its jurisdiction;

and that the statute, so applied, is therefore beyond the power of the State and violates the due process clause of the Fourteenth Amendment.

The Massachusetts court, in holding that the statute had been properly construed and applied by the commissioner and in sustaining the validity of the taxes, said: "The commissioner . . in determining under G. L. c. 63, § 44, the 'corporate excess employed within the Commonwealth, by every foreign corporation' doing domestic business here is required to give those words the definition and to follow the legislative mandate in G. L. c. 63, § 30, cl. 4. . . The petitioner held the stock in its two subsidiary corporations for the lawful prosecution of its business. All the facts recited lead to the conclusion that there was no error of law in including the shares of stock for computation of the excise of the petitioner. The entire business of the petitioner was conducted in this Commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner made use of the activities of these subsidiary corporations as essential parts of its business. Without discussing whether any one or more of these factors standing alone would justify the method employed in ascertaining the excise, their collective force is sufficient to that end. The interpretation of the words of the statute requires this result. . . The language of the statute . . is explicit and its meaning is not clouded or obscure. It cannot render subject to direct taxation property not within the jurisdiction; but where other essential elements are present the excise is justified. . . Apart from the domicil of the several corporations and looking for the moment only at tangible property and its physical location, there is jurisdiction to sustain taxation in this Commonwealth. All the business of the petitioner and of one of its subsidiaries and a principal part of the business of the other subsidiary is conducted in Massachusetts. . . [There] is no direct tax on property, but an excise on a foreign corporation, levied solely on the privilege of doing domestic business within this Commonwealth, measured in part on the value of stock employed in business in this Commonwealth. . . The question, whether the value of the stock of the Lawrence Company attributable to that part of its business and property in other States ought to have been deducted is not presented on this record. That relates to overvalu-

ation, as to which a different remedy is provided . . . G. L., c. 63, § 71."

For present purposes it may be assumed that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that State for the purpose of imposing a direct property tax. See *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, 80. But here the statute does not impose any direct tax upon these stocks and, as construed by the Massachusetts court, merely treats them as assets employed by the petitioner in its business within the State, and therefore requires that they be included when the total assets so employed by it are computed for the purpose of arriving at the proportionate part of the value of its own capital shares—determined by comparing the assets employed in business within the State with the total assets wheresoever employed or located—on which the excise for the privilege of carrying on its business within the State is imposed.

It is settled law that a State may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its total gross receipts that are received within the State, *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 228; or by the proportionate part of its total capital stock which is represented by the property located and business transacted within the State, *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 293, *American Mfg. Co.* v. *St. Louis* (C. C. A.), 8 F (2d) 447, 450; or by the proportionate part of its total net income which is attributable to the business carried on within the State, *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120, *Bass etc., Ltd.* v. *Tax Comm.*, 266 U. S. 271, 282.

Here both the commissioner, the administrative officer charged with the enforcement of the statute, and the Massachusetts court, have found that the capital stocks of the two subsidiary companies were employed by the petitioner in carrying on its business within Massachusetts. We find no adequate reason for disturbing this conclusion. On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner, through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts—

to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the State. *Cf. Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456. And since the Massachusetts court did not determine whether the value of the stock in the Lawrence Company attributable to that part of its business and property in other States should have been deducted, for the reason that, as to such overvaluation, if any, a different statutory remedy was provided, we have no occasion to consider that question.

It is said that under the Massachusetts statute the subsidiary corporations were subject to similar excises on their own account, and therefore there will be what is akin to double taxation. But we are not here concerned with an excise tax on the subsidiary corporations and need not consider its constitutional propriety either independently or in connection with the excise against the petitioner.

Judgment affirmed.

Mr. Justice McREYNOLDS is of opinion that the effect of the challenged judgment is to tax property beyond the jurisdiction of Massachusetts, and that therefore it should be reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.